The Global Advocate: From Ethical Anarchy to Discernable Duties

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JUST AS TOURISTS MAY FIND THAT CULTURAL TRADITIONS FROM HOME CAN CAUSE MISUNDERSTANDINGS OR EVEN OFFENSE IN FOREIGN LANDS, SO TOO HAVE LAWYERS FOUND WITH THEIR PROFESSIONAL AND ETHICAL TRADITIONS. AS LEGAL DISPUTES HAVE GONE GLOBAL, A GROWING NUMBER OF U.S. LAWYERS, SOME WITH PASSPORTS THAT ARE NEWLY MINTED AND OTHERS THAT HAVE MANY STAMPS, ARE TRAVELING ABROAD TO REPRESENT THEIR CLIENTS. PREDICTABLY, SOME OF THESE ACCIDENTAL LEGAL TOURISTS HAVE BECOME EMBROILED IN CONFLICTS WITH FOREIGN ETHICAL AND LEGAL OBLIGATIONS THAT RELATE TO THEIR CONDUCT.

1 One reason why global advocates can be considered “accidental tourists” is that, for the most part, U.S. law schools did not prepare them to handle international and transnational cases. The internationalization of the U.S. law school curriculum is a relatively recent phenomenon. While there has been significant innovation in this area, there remain doubts about how well U.S. law schools are preparing students for international or global practice. See Carol Silver, Adventures in Comparative Legal Studies: Studying Singapore, 51 J. LEGAL EDUC. 75, 78 (2001) (arguing that “despite the attention to internationalization and the increased presence of international and comparative courses in the curriculum, there remains doubt that sufficient numbers of U.S. law students are enrolling in international and comparative law courses). Law schools in most other countries make international law a mandatory course. See Susan Sturm and Lani Guinier, Symposium: The Law School Matric: Reforming Legal Education in a Culture of Competition and Conformity, 60 VAND. L. REV. 515, 517-518 (2007).

2 The scope of this Article is limited to the ethical rules that apply to attorneys when they act in their role as advocate. Distinct rules may apply when they act in advisory roles or as counsel in a transactional setting. See Peter C. Kostant, Sacred Cows or Cash Cows:
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To provide just a few examples, attorneys have been arrested for trying to serve process and gather evidence in foreign countries. Their efforts to take depositions in other countries have provoked diplomatic protests by some of our closest allies, and their attempts to “prepare” witnesses for testimony before international tribunals have been met with allegations of “witness tampering.” In one of the most striking examples, dubbed “the greatest ambulance chase in history,” dozens of U.S. attorneys descended on unsophisticated victims of the Union Carbide gas leak in Bhopal, India. In fairly clear violation of Indian law, they directly solicited victims to sign contingent fee retainer agreements for tort actions to be brought in the United States.

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3 As recently as 2007, an American attorney with a major law firm was criminally convicted and ordered to pay a 10,000 euro fine in France for interviewing a witness in France for purposes of obtaining information for a proceeding in the United States in violation of French law. See Paris Court of Appeals, File n. 06/06272, Judgment of March 28, 2007 (unofficial translation on file with author).

4 Other countries have also lodged diplomatic complaints. See Diplomatic Note No. 88 dated April 14, 1988 from The Chinese Ministry of Foreign Affairs (stating that for a U.S. consular officer to receive or witness statements made under oath or affirmation in China in contravention of Chinese law would not conform to the provisions of the U.S.-China bilateral consular convention).

5 As one scholar recounts, opinions of lawyers from different jurisdictions working with the International Criminal Tribunal for the Former Yugoslavia have starkly different opinions about pre-testimonial communication with witnesses:

… An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice.

Karen L.K. Miller, Zip to Nil?: A Comparison of American and English Lawyers’ Standards of Professional Conduct, CA32 ALI-ABA 199, 204 (1995). For additional discussion of these issues, see Mary C. Daly, The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization, 46 EMORY L.J. 1057 (1997)


7 “One Washington, D.C., lawyer claimed to have signed contingency fee agreements with more than 7,000 plaintiffs within five working days of the gas leak—approximately one agreement every 60 seconds.” David T. Austern, Is Lawyer Solicitation of Bhopal Clients Ethical?, January 25, 1985 LEGAL TIMES 16 (January 21, 1985). While this type of solicitation so soon after the disaster would arguably violate U.S. ethical rules, it would
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The rise of the “global advocate” introduced a new paradigm to previous conceptions of international law practice and the presumed identity of international lawyers.\(^8\) When Oscar Schachter first wrote his seminal piece *The Invisible College of International Lawyers*,\(^9\) his vision was trained on public international lawyers who rotated principally between academia, governmental diplomacy, treaty negotiation and service in international organizations. The emergence of the private international lawyer and the global law firm has supplemented, and in many respects overtaken, Schachter’s state-centered, public international law model.

Initially, Schachter’s public international lawyer was joined only by international corporate and transactional lawyers.\(^10\) These two earlier models of international lawyers have now been joined by the emergence of the global advocate, who is proving to be a particularly vibrant and important actor on the world stage. In recent years, the number of international courts and tribunals has exploded.\(^11\) In addition, disputes in

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8 The term “global advocate” refers to all attorneys who practice dispute resolution in cross-border or international cases. In this Article, I focus on the narrower subset of U.S. attorneys who are involved in either in cases in U.S. courts that involve parties, laws or events from foreign jurisdictions, or in cases before international or foreign tribunals. Within this category, there are subspecialties, such as the international arbitration specialist and the international criminal prosecutor. There are also differing levels of experience among global advocates. Some become involved in international or transnational disputes by accident when a conventional domestic case ends up implicating a foreign or international element. Other global advocates have developed entire practice groups that do nothing but represent clients in transnational and international disputes.


10 Until relatively recently, the conventional wisdom was that “[a]ny firm that aspires to become transnational must … emphasize transactional lawyering rather than advocacy[].” Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 743 (1994). As a result of this assumption, most attention on regulation of multi-jurisdictional practice has traditionally focused on transactional lawyering.

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national courts are no longer confined to domestic parties and domestic events. At the same time, the legal profession has seen the development of new practice specialties, with major departments at international law firms devoted specifically to international arbitration, international litigation, and other forms of transnational dispute resolution. The importance of these forms of international adjudication is not measurable only by the number of cases, tribunals and international dispute resolution lawyers. The ever-increasing interaction among them has had discernible effects on traditional conceptions of sovereignty, the functioning of


12 Several scholars have documented the increase in foreign parties in U.S. litigation, as well as a phenomenon of so-called “global class actions.” These global class actions present myriad new legal and professional challenges. See Debra Lyn Bassett, U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction, 72 FORDHAM L. REV. 41, 44 (200__) (“A transnational class action requires an examination of potential international law and treaty obligations, a careful evaluation of the laws of the countries involved, and an examination of the potential cultural, linguistic, and logistical implications.”). As a result, some law firms have specialized in global class actions, most notably ____, which is a U.S.-based firm that has opened in 200 an office in London staffed by UK lawyers who have also trained in U.S. class action techniques.

13 Many of the lawyers in these practices defy being easily categorized in terms of their professional ties. In one example from the newer generation of global advocates, Ms. Nadia Darwazeh is an attorney who speaks, English, German, French, Mandarin Chinese and Dutch. She received her legal education in the UK, is licensed in England & Wales (as Solicitor-Advocate) and Germany (as Rechtsanwältin), but currently practices international dispute resolution in Shanghai, China.

14 In some of the most recent examples, strategy and resolution of securities fraud lawsuits are intentionally being designed to take advantage of the synergies and interaction of multiple legal systems. In some of the most recent examples, strategy and resolution of securities fraud lawsuits are intentionally being designed to take advantage of the synergies and interaction of multiple legal systems. See Jenny S. Martinez, Towards an International Judicial System, 56 STAN. L. REV. 429 (2003); Shelley Thompson, The Globalization of Securities Markets: Effects on Investor Protections, 41 INT'L L. 1121 (Winter 2007).

national and international institutions and the development of international law.\textsuperscript{16} 

Global advocates stand at the epicenter of these transformative events, but so far have received surprisingly little attention from either legal scholars or professional regulation. Historically, even when global advocates violated foreign ethical or criminal rules, their activities were disregarded by U.S. and foreign bar associations as beyond their concern.\textsuperscript{18} 

Today, the need to regulate global advocates is universally accepted.\textsuperscript{19} Some scholars have long maintained that it is inevitable,\textsuperscript{20} while others have attempted to address some of the more practical problems.\textsuperscript{21} To date, however, only a few bar associations\textsuperscript{22} or international

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\item Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002) (arguing that lawyers are habitually divided into two groups, those who are locally licensed and therefore subject to regulatory power of the local bar, and those who are not).
\item See Detlev F. Vagts, *The International Legal Profession: A Need For More Governance?* 90 A.J.I.L. 250, 261 (1996)("[A]s the number of international tribunals grows--as does the size of their caseloads--the utility of more formal and detailed guides seems apparent.").
\item Several scholars have noted the unique problems that arise in international adjudication. *See* Daly, *Dichotomy Between Standards and Rules*, supra note ___, at n.184 (describing ethical conflicts in the Yugoslav War Crimes Tribunal); Vagts, *The International Legal Profession*, supra note ___, at 250 (describing problems in Iran Claims Tribunal caused by lack of ethical consensus among attorneys). Only one article to date has directly addressed the issue of ethics in international arbitration, but with more of an aim to raising questions than resolving them. There is only one brief article squarely addressing attorney ethics in international arbitration, which aims more at raising questions than resolving them. *See* Mark P. Zimmett, *Ethics in International Commercial Litigation and*
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Tribunals have attempted to address the conduct of these global advocates. This reluctance in the face of such obvious need can be traced to an outdated, but entrenched, view of the relationship between attorneys and the jurisdiction in which they are licensed.

This view is evidenced in the fact that it was only 1983 when the American Bar Association first sought to address attorneys’ activities outside the state in which they were licensed. In its original form, Model Rule 8.5 expressly disavowed any application to transnational (as distinguished from interstate) activities. Instead, it left all questions about conflicting ethical rules abroad to “agreements between jurisdictions or …appropriate international law.” The problem, however, was that there

Arbitration, 626 PLI/Lit. 361 (2000). Cf. Thomas, Disqualifying Lawyers in Arbitrations, supra note ___ (addressing related procedural issues of attorney disqualification in arbitration proceedings, but disclaiming any attempt to encompass ethical regulation issues). Most work regarding ethics in international arbitration has addressed the ethical obligations of arbitrators. See, e.g., Chiara Giovannucci Orlandi, Ethics for International Arbitrators, 67 U.M.K.C. L. REV. 93 (1998). While most often framed as a matter of ethics, the professional conduct of arbitrators raises related, but inherently distinct questions about the nature of adjudication and the concept of an impartial adjudicator.

22 See Laurel S. Terry, An Introduction to the European Community's Legal Ethics Code Part II: Applying the CCBE Code of Conduct, 7 Geo. J. Legal Ethics 345, 348 (1998) (suggesting that the CCBE Code is the first step towards a comprehensive international code). In addition to the efforts by the Council of Bars and Law Societies of Europe, the Solicitors Regulation Authority (SRA) of England and Wales has adopted a comprehensive alternative to Rule 8.5. For further discussion of the SRA Code of Ethics Rule 15, see infra notes ___-___, and accompanying text.

23 There are ethical regulations at the ICTY, which provide rules regarding to counsel's obligations towards clients, the Tribunal and other third parties. The International Criminal Tribunal for the Former Yugoslavia, http://www.un.org/icty/legaldoc-e/basic/counsel/IT125-Rev2e.pdf (last amended June 29, 2007). Similarly, the ICC has a code of ethics regulating counsel. The International Criminal Court, Code of Professional Conduct for Counsel http://www.icc-cpi.int/library/about/ofﬁcialjournal/ICC-ASP-4-32-Res.1_English.pdf (adopted December 5th, 2005). However, private counsel at the WTO remain unregulated. Section of Intl’ law & Practice Recommendation, Am. Bar Ass’n, Private Counsel in WTO Dispute Settlement Proceedings, 34 VAND. J. TRANSNAT’L L. 969, 976 (2001)

24 As Mary Daly has explained, Model Rule 8.5 is not an ethical rule at all, but a choice of law rule. See cite. The American Bar Association adopted the Model Rules in 1983. They have been frequently amended, most recently in 2002. By adopting the Model Rules, the ABA replaced the ABA Model Code of Professional Responsibility (Model Code), which the ABA had adopted in 1969 and amended in 1980. Citers, Richard A. Zitrin & Carol M. Langford, Legal Ethics in the Practice of Law 6 (2d ed. 2002).
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were no such agreements or rules of international law, which meant international activities of U.S. attorneys were virtually unregulated.\(^{25}\)

In later versions, Rule 8.5’s limitation to interstate practice was abandoned and the Rule was instead expressly extended to transnational activities.\(^{26}\) With respect to advocacy,\(^{27}\) the text of Rule, now made applicable to international practice, provides that “for conduct in connection with a matter before a tribunal, the rules of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise[.].” Instead of fixing the problems inherent in transnational advocacy, however, this simple rule creates a host of new problems. Rule 8.5 not only allows depositions, service of process and Bhopal-style advertising\(^{28}\) in violation of foreign law and foreign ethical prescriptions, but it ethically authorizes such violations as long as they are undertaken in connection with a U.S. proceeding.

Meanwhile, when Rule 8.5 is applied to representation by U.S. attorneys before an international tribunal, it imposes on U.S. attorneys ethical rules that are almost assuredly different from those governing their opposing counsel and often utterly unrelated to the relevant tribunal or its procedures. Judges from the Iran Claims Tribunal or the International Court of Justice would likely be surprised to hear that U.S. attorneys appearing before them are bound by Dutch ethical rules, just as judges from the WTO Appellate Body would find it surprising that that U.S. attorneys appearing before them are bound by local Swiss ethical rules. Informal inquiries of leading international practitioners suggests that U.S. counsel themselves are at least as surprised as international judges or arbitrators about which ethical rules apply. These reactions are because, as discussed

\(^{25}\) Advocates may still be subject to criminal and civil sanctions, as well as oversight by other administrative agencies. Cite to Wilkins

\(^{26}\) Specifically, Comment 7 provides “[t]he choice of law provision [contained in Rule 8.5] applies to lawyers engaged in international practice[.]”

\(^{27}\) Unless otherwise indicated, this Article considers only those aspects of Rule 8.5 that apply to advocates. Other provisions of the Rule pertaining to transactional work provide more open-texture choice of law provisions that focus on the

\(^{28}\) Some activities by attorneys in Bhopal, most particularly direct solicitation in the days after the disaster, appear to violate also U.S. ethical rules. To the extent the ambiguous reach of state bar disciplinary jurisdiction prevented formal disciplinary action, Rule 8.5 provides a welcome mechanism for monitoring and prosecuting such abuses. The more delicate question is the consequences of attorney advertising in India that is prohibited under Indian law, but permitted under U.S. ethical rules.
in more detail below, the physical location of these international tribunals is largely unrelated to their purposes and procedures, or to the expectations of lawyers or presiding judges and arbitrators. 29

Rule 8.5 is the first effort in the United States to address directly the problems raised by cross-border and international advocacy. 30 Eighteen states have already adopted it, and another 19 that have adopted similar rules. 31 For these reasons, it represents an important development. At bottom, however, as this Article reveals, it is a failed experiment with respect to global advocates and must be rewritten. Rule 8.5 is based on assumptions that are based on outdated notions of territoriality and the historical relationship between the jurisdiction of tribunals and the licensing of attorneys. Based on this starting point, Rule 8.5 focused on the relatively modest question of which rules govern when an attorney operates outside of the system in which the attorney is licensed. The hallmark feature of global advocates, however, is that their practice transcends geography and instead exists in the interstitial gaps and relationships between different jurisdictions. The problem, in other words, is not that they occasionally and incidentally operate in a system other than the one in which they are licensed. Rather, the problem is that the place where they are licensed has receded in importance to their daily practice, which is quintessentially international and not rooted in any particular location.

29 See infra notes ____-____, and accompanying text.
30 The Council of Law and Bar Societies of Europe (“CCBE”) Code of Conduct for European Lawyers has identified the problem, but not offered any real guidance or solution, other than that attorneys inform themselves. Article 2.4 of the CCBE Code provides:

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

CCBE CODE OF CONDUCT, Article 2.4. For additional commentary on this provision, see infra notes ____-____, and accompanying text. For a more comprehensive overview of recent developments, see Laurel S. Terry, U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives, 4 WASH. U. GLOBAL STUD. L. REV. 463, 494 (2005).
31 States that have adopted a rule identical to ABA Model Rule 8.5 include Arizona, Arkansas, Connecticut, Delaware, Idaho, Iowa, Louisiana, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah and Washington. Other states have adopted a rule similar to ABA Model Rule 8.5, including California, Colorado, Washington DC, Florida, Georgia, Indiana, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, South Carolina, Wisconsin and Wyoming.
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As a consequence, by definition and design, these global advocates operate in a professional “space” that is distinct from the jurisdiction in which they are licensed and stretches beyond the jurisdictional boundaries of any particular tribunal. They maneuver in the nooks and crannies, the overlap and the inconsistencies between legal systems. Legal arbitrage is a core feature of their daily practice, and perhaps one of their most essential professional skills. This detachment from their licensing jurisdiction raises essential questions about the origin and object of their professional obligations, and the best means of regulating them. Where do their ethical obligations derive from? What is their professional role in relation to various systems? How should ethical and procedural conflicts between these different systems be resolved? Who should regulate them? And, at a more basic level, what are their obligations to upholding the rule of law in the various legal systems in which they act?

No one article could answer all of these questions. This Article therefore undertakes the more basic task of laying the groundwork for future efforts to inquire into and resolve these issues. Its starting point is to identify the fundamental inadequacies of Rule 8.5. The Rule was originally designed to regulate attorneys in a federal system who are licensed in one jurisdiction and occasionally perform professional services in another sister state. It was only extended to global advocates as an afterthought. As a result, as I describe in Part I, it is replete with conceptual and terminological problems that make it difficult to apply to global legal advocates. These textual and conceptual problems are, however, only symptoms of a much deeper ailment. Applying the terms of Rule 8.5 to a host of practical settings, I demonstrate in Part II that the Rule is fundamentally misconceived and cannot provide meaningful regulation for global advocates. In Part III, I begin the process of developing more meaningful rules and strategies for regulating global advocates. To that end, I outline an approach to conflict of laws analysis that will produce more satisfactory solutions. For international tribunals, I argue that national rules can never provide an adequate substitute for tribunal-specific rules and call on international tribunals to better articulate and develop their own rules. Finally, with respect to enforcement, I argue for a coordinated approach that has licensing bar associations working with foreign and international tribunals and regulatory authorities.
have built international networks to promote their effectiveness. These networks have been built by international lawyers, and in many instances global advocates. It is time now for them to turn their efforts to their own self-regulation.

I. Regulating U.S. Attorneys Abroad

The historical assumption and reality underpinning attorney regulation was that lawyers practiced in a delimited geographical region where they were licensed. Most lawyers were sole practitioners and, insofar as they existed, law firms were relatively intimate organizations of partners who all knew each other and primarily serviced local clients on local matters in local courts. Gradually, as the statistics reveal, localism

33 Some efforts are underway:

At the 2006 and 2007 ABA Annual Meetings, the E.U.-U.S. Legal Services Summits were co-hosted by the Council of the Bars and Law Societies of Europe (CCBE), and the Asia-U.S. Legal Services Summits included lawyers and bar leaders from Australia, China, India, Indonesia, Japan, Korea, Singapore, and Vietnam. The ITILS Task Force also convened discussions with Latin American bar leaders at the Fall Meetings of the Section of International Law in Houston in 2005 and in Miami in 2006. The ITILS Task Force also communicates regularly with the International Bar Association (IBA), the Union Internationale des Avocats (UIA), the Law Society of England and Wales, and the Law Council of Australia to exchange information, coordinate initiatives, and discuss strategies.


34 Charles W. Wolfram, Expanding State Jurisdiction to Regulate Out-of-State Lawyers, 30 Hofstra L. Rev. 1015 (2002) (arguing that lawyers are habitually divided into two groups, those who are locally licensed and therefore subject to regulatory power of the local bar, and those who are not).

35 As Mary Daly explains

Until recently, lawyers infrequently practiced in more than one state. Law firms rarely established branch offices, with the possible exception of an office in Washington, D.C. or in a distant city to meet the particular needs of a single client. Consequently, in searching for ethical guidance, lawyers, courts, and disciplinary authorities looked only to the professional standards adopted by a single jurisdiction, the lawyer’s state of general admission or the court to which the lawyer had been admitted pro hac vice.
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gave way to globalism.\textsuperscript{36} Prior to World War II, only four U.S. law firms had an overseas office, but by 2004 the number had grown to 381 foreign offices in seventy-six cities in forty-eight different foreign countries.\textsuperscript{37} Several other data points convey similarly dramatic tales of international expansion,\textsuperscript{38} including gains for smaller and medium-size law firms in the global market for legal services.\textsuperscript{39}

Professional regulation of attorneys has lagged behind these demographic developments. When U.S. authorities finally did attempt to catch ethical regulation up with the global activities of modern lawyers, they appear to have simply extended to the international arena a rule that was drafted for domestic multi-jurisdictional practice. This Part reviews the textual and conceptual problems that result from that extension.

A. The Drafting of Rule 8.5

As enacted in 1983, a quick read of Rule 8.5 might have suggested that it does apply to U.S. lawyers practicing law outside the United States.

\textsuperscript{36} Daly at ___. For an insightful analysis of the term how “partner” has become something of a misnomer as U.S. law firms have erupted into large corporate-like structures that sprawl across multiple jurisdictions, see [Wilkins, Partner Schmartner…]

\textsuperscript{37} The intermediate step between the local and the global is multi-jurisdictional practice and the rise of the national law firm. This Article does not directly address this phase, but several other scholars have documented this development and its significance for the legal profession. See Gary A. Munneke, \textit{Multijurisdictional Practice of Law: Recent Developments in the National Debate}, 27 J. LEGAL PROF. 91 (2003); John F. Sutton, Jr., \textit{Ethics and the Multijurisdictional Practice of Law: Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on “Ethics and the Multijurisdictional Practice of Law,”} 36 S. TEX. L. REV. 1027 (1995); Gerard J. Clark, \textit{The Two Faces of Multi-Jurisdictional Practice}, 29 N. KY. L. REV. 251, (2002).

\textsuperscript{38} Carole Silver, \textit{Winners and Losers in the Globalization of Legal Services: Offshoring the Market for Legal Services}, 45 VA. J. INT’L L. 897, 916-17 (2005). Notably, these statistics come from a study of only sixty firms, so the overall number is probably higher.

\textsuperscript{39} For example, as Laurel Terry notes, of “the world’s ten highest-grossing law firms had more than 50% of their lawyers working in countries outside of the firm’s home country.” Laurel S. Terry, \textit{A “How To” Guide for Incorporating Global and Comparative Perspectives Into the Required Professional Responsibility Course}, 51 ST. LOUIS U. L.J. 1135 (2007).

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As noted above, the 1983 version of the Rule provided that “for conduct in connection with a matter before a tribunal, the rules of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise[.]” The textual breadth of the Rule was belied by a specific exclusion that was sought by international lawyers to preclude application of this rule to them. As a result of their efforts, Comment 6 to the Rule disavowed any application to transnational or international legal practice and instead, as noted above, left any conflict of laws analysis to nonexistent “agreements between jurisdictions or … appropriate international law.”

Some years later, U.S. lawyers engaged in international practice apparently concluded that vagaries about which ethical rules apply could be more perilous than liberating. Accordingly, in 19XX the International Law section of the ABA requested that Rule 8.5 be revised to provide greater choice-of-law guidance to transnational and international practitioners.

As a result, the ___ revisions deleted Comment 6 and replaced it with the current Comment 7, which expressly rejected the exclusion, providing instead that the “choice of law provision applies to lawyers engaged in transnational practice[.]” The consequence of this change was to make Rule 8.5’s general provision—that conduct by attorneys in connection with litigation is governed by the “rules of the jurisdiction in which the tribunal sits”—applicable to activities by U.S. attorneys abroad. Similar to former Comment 6, the new Comment 7 makes reference to “international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions.” In contrast to the earlier version, however, these international sources only become applicable if they produce a different result than the basic choice-of-law provision of Rule 8.5.

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41 Comment 6 to the original version provided that the Rule was “not intended to apply to transnational practice” was deleted in August 2002, thus making this provision of Rule 8.5 applicable to also to foreign and international tribunals.
42 See supra note ____, and accompanying text.
43 Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age Of Global And Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV 463, 525. (through the Section of International Law of the ABA, speculating liability)
44 Id.
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Another important change brought by the Ethics 2000 Commission is that the word “tribunal” was substituted in for the earlier version’s references to “court.” This change was made in recognition of “the increasing use of alternative dispute-resolution processes[,]” and extended the Rule to “binding arbitration and other methods of formally adjudicating the rights of parties.” As a result of these changes, for those few states that have adopted it, Rule 8.5 now purports to provide choice of law guidance for U.S. attorneys who appear before foreign courts, international courts and tribunals, and international arbitral tribunals. As described in more detail below, the current version of Rule 8.5 creates as many problems as it resolves. These problems may have been foreshadowed by the drafting history of the provision, which appears devoid of any discussion or consideration of the unique complications involved in international and transnational advocacy. More fundamentally, new Rule 8.5 proceeds from misconceptions about the nature of international litigation and arbitration, as well as the character and content of foreign ethical regimes, while producing anomalous, and often indefensible, results.

B. Special Provisions for Advocates

In an acknowledgement that advocacy raises distinct issues from other types of legal representation, Rule 8.5 includes special provisions for advocates. Specifically, it provides that “for conduct in connection with a matter before a tribunal, the rules [of professional conduct] of the jurisdiction in which the tribunal sits [shall apply], unless the rules of the tribunal provide otherwise[.]” Rule 8.5’s provisions regarding non-adjudicatory transnational activities admit that “no single test …can be applied to determine the appropriate choice-of-law rule in each case.”


46 1993 version was that for conduct “in connection with a proceeding in a court before which a lawyer has been admitted to practice….the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise.”

47 Model Rule 8.5(b)(2) addresses transnational transactional and corporate practice, providing “for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” See MODEL RULE PROF’L CONDUCT 8.5 (2001).
Accordingly, it permits some flexibility for attorneys and disciplinary authorities to assess the appropriateness of ethical rules to particular conduct. Subsection (b)(1) contains no such qualifying language, and hence permits no discretionary analysis regarding which rules would be appropriate. The justification for this inflexibility is that the advocate’s ethical obligations are firmly tethered to the location of the adjudicatory decisionmaker.

There are good reasons for special choice-of-law rules that apply exclusively to adjudicatory settings, and for linking those rules to the adjudicatory decisionmaker. One of the most pressing reasons for insisting on a clear rule is to avoid the possibility that opposing attorneys in the same proceeding could be subject to different ethical rules. As Detlev Vagts explains:

[It] would not be workable to allow the counsel for opposing sides in a civil case to enter the courtroom subject to different rules. … It would not do to prohibit one lawyer from a civil law jurisdiction from interviewing a witness before the trial while the American lawyer would not only be allowed to do so but would be guilty of professional negligence if he or she presented an un-interviewed witness.

While this equality of arms consideration is a powerful reason to regulate attorneys appearing in international and transnational adjudicatory settings, as illustrated below, application of Rule 8.5 fails to ensure the desired result. Even worse, as described in more detail below, in some contexts it may actually increase the likelihood that attorneys in the same adjudication will be abiding by different rules.

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48 This flexibility is not without its problems. One member of the committee “filed a statement designated “dubitante” in which he expressed significant due process and equal protection reservations” with the rule. Daly at n. 172.


50 Impartiality is an attribute of adjudicators that in turn demands audi alteram partem, or equality of the parties. See e.g. V.S. Mani, International Adjudication: Procedural Aspects 16-17 (Martinus Nijhoff Publishers 1980) (1980). As told in the Sanskrit play Mrichchakatika, as far back as 485 B.C., courts in India honored this principle by not allowing the fact that a complainant was the king’s brother-in-law to influence the court’s integrity. Id. at 17

51 See infra notes ___-____, and accompanying text.
Another reason why adjudicatory settings deserve special rules is that presiding tribunals are presumed to have a particularized interest in regulating attorneys appearing before them, as well as particular authority over the conduct of such. An ordinary choice-of-law rule based on the weight of territorial contacts, as found in the other provisions of Rule 8.5, might not give adequate deference to the tribunal’s interest or procedural authority. Rule 8.5 ties applicable ethical rules to the tribunal, albeit imperfectly, but it fails to afford them an explicit role to play in exercising that power. While this oversight is not a direct affront to international tribunals, many of which may not contemplate for themselves an express role in regulating attorneys who appear before them, it is a missed opportunity to help U.S. bar associations in enforcing the applicable rules.

C. Blurry Lines and Built-In Ambiguities

The stated aim of the current version of Rule 8.5 is to provide for “relatively simple, bright-line rules” for attorneys and regulators to determine what ethical rules apply to multijurisdictional, and now also transnational, legal activities. While several of the problems of Rule 8.5

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52 Since Rule 11 went into effect, federal judges have shown a willingness to make use of it to regulate attorneys appearing before them. See e.g., Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN. L. REV. 793 (1991) (noting that “in the seven years since Rule 11 was amended, it has generated well over a thousand opinions”). On the other hand, “the majority of Continental rules of civil procedure and those influenced by them impose no direct compulsory sanctions.” Rolf Sturner, Discovery and Sanctions Against Non-Compliance, 6 UNIF. L. REV. 877 (2001). France, however, does allow for an “astreinte,” a type of procedural fine, although the application of this principle is very rare in practice. Id.

53 International arbitral tribunals do not necessarily enjoy this competence. See infra notes ___–___, and accompanying text.

54 Recommendation and Report to the House of Delegates. “as straightforward as possible” which rules apply, a goal that is by the comments to the Rule to be “in the best interest of both clients and the profession[.]” Professors Geoffrey Hazard and _____ Hodes have argued that making Rule 8.5 applicable to international law practice was done in response to insistence by French professional regulatory authorities as a condition of their recognition of American lawyers as conseil juridique, or “juridical advisors” in English. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 8.5:101 (2d ed. Supp. (1994). Others have questioned the authority for this justification, which does not appear in the notes or comments. Mary C. Daly, Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All, 36. S. TEX. L. REV. 715, 757 (1995).
only become apparent in its application, others are evident from its very wording. These ambiguous references appear to result principally from the fact that the Rule was written against the background of assumptions that apply in domestic contexts. This Section exposes the conceptual and interpretative problems raised by the text of Rule 8.5, whereas Part II will take up more generally whether the substantive provisions of Rule are appropriate for global advocates.

1. Geographical Location and Ethical Rules

A fundamental assumption underlying Rule 8.5 is that there is a meaningful link between the place of adjudication and the decisionmaker’s jurisdiction. This assumption is undoubtedly predicated on the fact that such a link is generally present in domestic U.S. court systems, which Rule 8.5 was originally intended to govern. However, as a rule, no comparable systematic or meaningful link exists with international courts and tribunals.

In domestic systems, the jurisdiction of a court and the identity of advocates who practice before it are determined by the geographic realities of where it is located. For example, the state courts of New York are located physically in New York, are established under the Constitution of the State of New York, and have jurisdiction that is predicated on (even if not strictly limited by) the geographic boundaries of New York State. In this example, as with all national courts, the identity of the court, its jurisdictional mandate and its place of operation are inherently interconnected and effectively indivisible. Moreover, unauthorized-practice-of-law rules affirm and reinforce the inter-relationship with place by requiring that all attorneys who practice before a New York court are either members of the New York Bar Association or admitted pro hac vice. This interconnectedness is a consequence of the fact that national courts are instruments of national sovereignty (or its political subdivisions), which in turn is an inherently territorial-based concept.

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55 These problems are discussed infra Part II.
56 Model Rule 5.5(a) provides: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”
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The same inter-relationship with place does not ordinarily exist with either international courts or other international tribunals. Instead, with public international courts and tribunals, precisely the opposite is true. The physical location of most international tribunals is either a random choice produced through historical accident, negotiation and compromise, or a choice predicated on other non-substantive issues such as convenience. As a result, and in contrast to domestic courts, normally the location of an international tribunal is intentionally and systematically unrelated to the tribunal’s jurisdiction and procedures, or to the presumptive identity of the lawyers who appear before it. This detachment from the local procedures of the tribunal’s geographic seat is one feature that makes a tribunal “international.” In sum, U.S. lawyers practicing before the International Court of Justice or the Iran Claims Tribunal in the Hague do not expect to be governed by the ethical rules applicable in local judicial proceedings in the Netherlands any more than lawyers appearing before an ICSID, WTO or ICC tribunal seated in Geneva, Switzerland expect to be subject to the ethical rules applicable in Swiss national judicial proceedings.

This disconnect seems to have been acknowledged, at least implicitly, by bar associations that might otherwise attempt to regulate attorneys appearing within their jurisdiction. Unauthorized-practice-of-law requirements, which govern appearances in local courts and sometimes apply to domestic arbitrations, most often exempt international arbitrations. Meanwhile, no State has sought to inject its professional

58 For a discussion of international arbitration tribunals, see infra notes ____-____, and accompanying text.
59 There are some instances in which international tribunals have jurisdiction over domestic crimes, which may imply the presence of lawyers from the relevant jurisdiction. For example, the Special Tribunal for Lebanon is a treaty-based Tribunal that was established through a resolution of the UN Security Council. It is unique, and somewhat controversial, in that it depends solely on substantive crimes that are defined under domestic Lebanese law. See See Nidal Nabil Jurdi, The Subject-Matter Jurisdiction Of The Special Tribunal For Lebanon, 5 J. INT’L CRIM. JUST. 1125, 1126 (2007).
60 There are also “hybrid international-domestic” tribunals, such as the ad hoc Court for East Timor, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.” Michael P. Scharf, Forward: Lessons From The Saddam Trial, 39 CASE W. RES. J. INT’L L. 1 (2006-2007). Another recent example of a hybrid international-domestic tribunal is the Iraqi High Tribunal (IHT) in Baghdad. Id. “These tribunals are often founded under the auspices of international organizations, but are at least partially staffed with local attorneys and are physically located in the local jurisdiction.” Id.
61 Even the California Supreme Court case that touched off the firestorm of concern about multijurisdictional practice by finding that New York lawyers in an arbitration in
regulation of attorneys into the activities of international tribunals that might be located in their territory.\textsuperscript{62} As a result, international tribunals operate as regulatory oases from the perspective of local bar associations in the territory where they are located. The fact that national bar associations California were engaged in the unauthorized practice of law included a footnote exempting international arbitration from its analysis. \textit{See} Birbrower, Montalbano, Condon, & Frank, P.C. v. Superior Court., 949 P.2d 1 (Cal. 1998) (noting that the California Code of Civil Procedure permits parties to an international commercial dispute to either appear in person or be represented or assisted by any person of their choice, regardless of whether that person is licensed to practice law in California or any other jurisdiction).

In something of a historical oddity, some jurisdictions insist that party representatives in international arbitrations be lawyers and, in some more unusual instances, that they be locally-licensed lawyers. Particularly this later requirement can be understood as an assertion of jurisdiction to regulate attorneys appearing in an arbitration within a State’s territory, though today virtually all jurisdictions have eliminated such rules. \textit{See} Richard A. Eastman, \textit{INTERNATIONAL DECISION: Birbrower, Montalbano, Condon & Frank V. Superior Court, 17 Cal. 4th 119, 70 Cal. Rptr.2d 304. Supreme Court of California, January 5, 1998, modified February 25, 1998, 94 AM. J. INT’L LAW 400, 403 (April 2000)} (discussing the trend in many countries of “liberalizing the right of representation”). In the United States, several states have prohibited appearances in by out-of-state lawyers in in-state arbitrations as the “unauthorized practice of law.” Somewhat surprisingly, these controversial provisions usually contain exceptions for international arbitration. This exception is odd since outside of the international arbitration contexts, foreign attorneys are not allowed to perform any other legal activities without being licensed or obtaining permission to practice in the state. \textit{See} Steven C. Nelson, \textit{American Bar Association Section of International Law and Practice: Reports to the House of Delegates, 24 INT’L LAW. 583 (Summer 1990)}; George A. Riemer, \textit{A State of Flux: Trends in the Regulation of Multijurisdictional Practice of Law, 64 OR. ST. BULL. 19} (August/September, 2004). \textit{See also} ABA Center for Professional Responsibility, \textit{State Implementation of ABA MJP Policies} (August 20, 2008), available at \url{http://www.abanet.org/cpr/mjp/recommendations.pdf}.  

Stephen Gillers, \textit{It’s an MJP World: Model Rules Revisions Open the Door for Lawyers to Work Outside Their Home Jurisdictions}, 88 A.B.A.J. 51 (December, 2002) (describing the revision of ABA Model Rule 8.5 as a response to \textit{Birbrower}). The exception for international arbitrations arguably provides foreign lawyers greater rights than attorneys from sister states should presumably be entitled to greater leeway, not less, than foreign attorneys. The international exception essentially permits foreign attorneys to appear in any arbitration (since their participation would almost by definition signal the international character of a case), whereas attorneys from other states can only appear in some cases, namely those that are international. Other states have similar rules. \textit{See} Fla. Bar Reg. R. 1-3.11 cmt. (2006) Florida Rule of Professional Conduct 1-3.11 (“This rule applies to arbitration proceedings held in Florida where [one] or both parties are being represented by a lawyer admitted in another United States jurisdiction or a non-United States jurisdiction .... However, entire portions of subdivision (d) and subdivision (e) [pertaining to _________] do not apply to international arbitrations.”).
do not actively assert any interest in the operations of international tribunals suggests that the choice of ethical rules selected by Rule 8.5 has been implicitly rejected by the national bar associations whose rules are supposed to apply. Moreover, it foreshadows the need for specialized rules for these tribunals and raises implicit doubts about the appropriateness of using territory-based choice of law rules as a substitute.

2. Where Does A Tribunal “Sit”? 

Another textual ambiguity in Rule 8.5 is its equation of an international tribunal’s legal situs as the place where it “sits.” Under Rule 8.5, it is the ethical rules of the place where a tribunal “sits” that apply to a U.S. attorney’s conduct in connection with proceedings before that tribunal. In national courts, the term “sits” is uncontroversial because they only sit, and consequently have their “seat” or “legal domicile,” in one place. With international tribunals, however, there are a diversity of arrangements, which make it difficult to determine where a tribunal “sits” within the meaning of Rule 8.5.

International tribunals, however, may “sit” in one place, but have their “seat” in another. For example, the Statute for the International Tribunal for the Law of the Sea, provides that the Tribunal has its “seat” in “the Free and Hanseatic City of Hamburg in the Federal Republic of Germany[,]” but “may sit and exercise its functions elsewhere whenever it considers this desirable.” With international public law tribunals, such as the Tribunal for the Law of the Sea, the separation of the seat from the location of actual hearings is rare, although by no means unheard of. The same is not true of international arbitral tribunals, where arbitral tribunals are frequently “seated” in one place, but “sit” and otherwise conduct their functions in other places.

The “seat” of an international arbitration is not simply a point on a map, but is legal concept that attaches a host of important consequences to

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63 BORN, supra note ___, at 23 (defining “seat” to mean “legal domicile” or “juridical domicile” and tracing concept to relevant international conventions and national laws); G. Petrochilos, Procedural Law in International Arbitration -- (2004).

64 One historical exception is U.S. circuit court judges and Supreme Court justices “rode a circuit,” which is where circuit courts got their name. For a brief history of a circuit riding, see David R. Stras, Why Supreme Court Justices Should Ride Again, 91 MINN. L. REV. 1710, 1714-1717 (2007).

the proceedings and the resulting award. As Gary Born explains, “the national arbitration legislation of the arbitral seat will ordinarily govern important aspects of both the ‘internal’ procedural conduct of the arbitral proceedings and the ‘external’ relationship between the arbitration and national courts.”

For these reasons, international arbitration can be said to have a “rootedness” to its seat that public international tribunals do not generally have. At the same time, it is very common in international practice for arbitral tribunals to hold hearings and meetings in places other than the legal “seat” – in a literal sense, to “sit” in places other than the arbitral “seat.” On some occasions, the “seat” of an arbitration can be implied legally and differ either the place identified by the parties or where the hearings take place. In these circumstances, the language of Rule 8.5, which refers to the place where tribunal “sits,” raises significant ambiguities as to how it is intended to be applied in the context of arbitral proceedings.

Ultimately, for reasons that are explained below, international tribunals must develop their own ethical rules. But if conscripting national

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66 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (forthcoming 2008) (manuscript ch. 10, at 7, on file with author); G. PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION (2004) In the absence of party agreement, the law of the seat can impose procedural and evidentiary requirements and prohibitions, as well as provide default rules that act as gap fillers. BORN, supra note ___, at 10. Meanwhile, the courts in the arbitral seat may provide important functions in support of the arbitration, such as facilitating arbitrator appointments (again in the absence of agreement), ruling on arbitrator challenges, issuing interim relief or ordering documentary or testimonial evidence. Cite.

67 See id. at 23.

68 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (forthcoming 2008) (manuscript ch. 10, at --, on file with author). All leading institutional arbitration rules and many arbitration statutes have similar provisions. See, e.g., UNCITRAL Rules, Art. 16(2); LCIA Rules, Art. 16.2 (“The Arbitral Tribunal may hold hearings, meetings and deliberations at any convenient geographical place in its discretion; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat of the arbitration and any award as an award made at the seat of the arbitration for all purposes.”); ICC Rules, Art. 14(2); ICDR Rules, Art. 13(2); UNCITRAL Model Law, Art. 20(2); English Arbitration Act, 1996, §34(2)(a); Japanese Arbitration Law, Art. 28(3). [these cites are from Born—need to either be “domesticated” or cite him as source]

69 For example, an English court recently ruled that the legal seat of an arbitration was England where the parties had provided for the application of English procedural law, notwithstanding the parties’ purported designation in their contract of Scotland as the seat of the arbitration. See Braes of Doune Wind Farm (Scotland) Limited v. Alfred McAlpine Business Services Limited [2008] EWHC 426 (TCC).

70 See infra notes ____-____, and accompanying text.
ethical rules into service must be accepted in the short run as a temporary, second best solution, it is nevertheless misguided to tie the choice to the jurisdiction where an international arbitration tribunal “sits” instead of where it has its “seat.” Often, the place where a tribunal “sits” is chosen solely for convenience, and with no intention on the part of the parties or tribunal to change the legal rules applicable in the arbitral proceedings from those of the “seat.”

3. What “Rules” of Conduct Apply?

Another ambiguity in application of Rule 8.5 is that it designates the “rules” of the place where a tribunal sits. In the domestic context, the term “rules” would seem to refer to the code of attorneys’ professional conduct in a sister state. This reference, however, would—at best—be incomplete. As several scholars have identified, “[t]he rules and institutions controlling lawyers’ conduct comprise a complex system”\(^\text{71}\) that embodies not only ethics rules embodied in codes, but also statutes, procedural rules, inherent judicial power, agency law, criminal law and tort law.\(^\text{72}\) Thus, if the California Bar Association were to determine under Rule 8.5 that Nevada rules of conduct apply to a particular instance of alleged lack of diligence and competence, it will look not only to Nevada Rules of Professional Conduct, but also to bar association and judicial opinions interpreting and applying those rules, as well as to procedural rules and malpractice standards that give meaning and context to those rules. In other words, identifying the applicable “rules” of another jurisdiction is not as simple as opening a book to the page where its code of conduct is written.\(^\text{73}\)


\(^{73}\) This observation reveals a larger problem that drafters of Rule 8.5 apparently did not consider how its application to inter-state practice might different from international or transnational practices. There are important differences do exist, however, which have critical implications for regulation of attorney ethics and conduct. The ethical rules of individual U.S. states are relatively homogenous because the ethical rules of most individual states are predicated on the ABA’s Model Rules. As a result, there are only isolated, even if occasionally significant, differences between the ethical rules of state bar associations. More importantly, because they are borne out of the same legal cultural and operate in largely similar legal systems, generally no one is really offended, for example, if an attorney abides by Florida confidentiality rules instead of Alabama rules.
In cross-border contexts, identifying the applicable rules can be much more difficult. As an initial matter, the codification of ethical rules is a relatively recent phenomenon and not all foreign jurisdictions have reduced their standards of conduct to such codes. Even in countries that have written codes, such as England, there are also “many unwritten rules of professional conduct.” It is unclear what role, if any, “unwritten rules” should have if, for example, a U.S. bar were applying English ethical rules under Rule 8.5.

Even when a foreign jurisdiction has a written code of conduct, there are complex and delicate questions about how to establish or “prove” the precise content or interpretation of those rules. When foreign substantive law governs a particular issue in U.S. litigation, the substance of foreign law must be proven by the parties, usually through experts, since it cannot simply be researched by the court, particularly if the law is in a different language. Usually, this proof is offered through presentation of competing experts, who inevitably disagree. Given that ethical rules and precedents applying them are much less clear or easily identified than authorities for substantive legal issues, these problems of proof will likely be multiplied in the context of ethical regulation. At least one drafter of Rule 8.5 expressed apprehension about the due process implications of ambiguities regarding which rules apply. As it turns out, ambiguities in identifying what body of rules applies may pale in comparison to the uncertainties that arise in actually applying those rules. In the United States, even with respect to purely local practice, there are multiple, often

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73 By contrast, the ethical rules among various nations, and the national legal frameworks in which they exist, are considerably more variable than among the ethical regimes of individual U.S. jurisdictions. As a result of these differences, regulatory authorities in different national jurisdictions may be profoundly concerned if foreign attorneys violate local ethical norms, as illustrated by criminalization of and diplomatic protests regarding certain activities by foreign lawyers described above.


76 See FRCP 44.1.
overlapping or inconsistent bodies of rules that purport to regulate particular attorney conduct.\textsuperscript{77}

Apart from the existence and interpretation of the rule governing particular conduct (the nature of which may itself require the synthesis and application of multiple overlapping sources), there are also questions about the role of social and customary practices that can often alter the essential meaning of a rule. Consider, for example, two recent empirical studies that investigated professional conduct in the United States and England. The studies evaluated levels of compliance with conflict of interest rules among American lawyers and English solicitors.\textsuperscript{78} Both systems operate in the same language and originate from the same legal tradition, and apparently have relatively similar, detailed written rules regarding such conflicts. When the results of the two studies are compared, however, they seem to suggest that textual similarity conceals significant divergences in their applications. Apparently, U.S. attorneys are more fastidious in their efforts to comply with conflict rules, even when such adherence is contrary to their business interests. English solicitors, on the other hand, appear to be more willing to bypass rules that are obsolescent or counterproductive.

Various hypotheses may account for these disparate rates of compliance, including differences in enforcement mechanisms,\textsuperscript{79} in the likelihood of negative social sanctions, in client tolerance, in the competitive structure of the legal services market, or in perceptions of the possibility of genuine harm. Regardless of why these differences exist,

\textsuperscript{77} As one joint committee by the ALI and the ABA concluded, “No area of local rulemaking has been more fragmented than local rules governing attorney conduct.” Q247 ALI-ABA 311 American Law Institute - American Bar Association in cooperation with the Federal Judicial Center Excerpts From Special Study Conference Of Federal Rules Governing Attorney Conduct Los Angeles, California January 9-10, 1996. As a result, the same report explains, ambiguities raised by the existence of ambiguous and multiple bodies of overlapping rules has these ambiguities have led to due process and ‘void for vagueness’ challenges in increasing numbers.” \textit{Id.}


\textsuperscript{79} In the United States, departure from the rule is likely to draw a disqualification motion from opposing counsel. The United States is relatively unique in permitting opposing counsel to raise motions for disqualification, and definitely unique in allowing the disqualification process to rise to the level of litigation strategy. cite
however, they raise important questions about the complexities about how the bar association of one nation can apply the “rules” of another. Could or should a U.S. bar association account for the social context and institutional functions of the authorities that would apply the relevant foreign ethical rules? For example, in applying English conflict of interest rules, should as U.S. bar association take account of the fact that English attorneys are not punished for certain types of violations? The underlying justification for Rule 8.5 seems to be that a U.S. advocate appearing in proceedings in a foreign jurisdiction should be regulated as the attorneys from that jurisdiction. Blindly applying foreign ethical rules without regard to how they are interpreted and applied by the national regulatory bodies would alter, in some instances profoundly, the nature and meaning of those rules.80

4. What is a “Matter”?

The advocacy provisions of Rule 8.5 are predicated on a model that assumes that there is a single “matter” pending before one “tribunal” for any particular dispute. While this may be a dubious proposition in large, complex domestic matters, it is certainly a faulty assumption with sizable international disputes. Various legal, procedural and other differences between national systems create much more powerful incentives for parties to forum shop in international cases than they might have in purely domestic cases.81 As a result, parties to the same international dispute often seek to litigate simultaneously in the courts of two or more countries.82 In the absence of transfer, consolidation, shared jurisdictional precepts, and any international equivalent to the Full Faith and Credit Clause for enforcement of judgments, a transnational case is often more likely to be litigated in multiple courts than a purely domestic case. Moreover, judicial cooperation is often necessary in international cases, for example to obtain discovery from foreign sources or to enforce a final judgment.

80 As David Wilkins has persuasively demonstrated, when domestic U.S. institutions apply rules, they necessarily impose a “substantive tilt” that is the product of their own institutional history and objectives, as well as conceptual and cultural biases. David B. Wilkins, Who Should Regulate Lawyers? 105 HARV. L. REV. 799, 851 (1992). The force of this observation is amplified when the cultural historical traditions span national and linguistic boundaries.

81 GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 521 (2007).

82 See id.
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This potential for multiple courts to be involved in a single case challenges the underlying model on which Rule 8.5 is based, which as noted above contemplates a single “matter” that is “pending before” one tribunal. An earlier version of the Rule had referred to the more delimited term “proceeding” (instead of “matter”). The purpose of the new language, according to the Ethics 2000 Commission Reporter’s Explanation of Recommendation, was to extend the Rule so that it “control[s] from the moment the matter can be said to be before a tribunal (typically the date the case is filed), even if no specific ‘proceeding’ is pending at the time the conduct occurs.” Although the Reporter’s Explanation goes on to state that “[n]o change in substance is intended[,]” the new formulation appears creates an ambiguity in international cases.

Consider, for example, a case that is pending before the federal district court in the Southern District in New York, but which requires that a deposition be taken before (in effect taken by) a judicial officer in Germany or Brazil. In international cases litigated in U.S. courts, Rule 8.5 would mean that the professional conduct of attorneys abroad is subject only to evaluation under a relevant state’s ethical rules as long as that conduct was “in connection with” a case pending in a U.S. court. As noted in the introduction, however, like many other countries Germany and Brazil both ethically and legally prohibit attorneys from taking a deposition of a witness. The judicially administered deposition in Germany or Brazil would not be considered a “proceeding” under the former version of the Rule, which would make it easy to determine that New York rules apply.

83 Although the term “proceeding” is not defined in the Model Rules, the Canons of Judicial Ethics which define a “pending proceeding” as a process that will reach a “final disposition.” See Canon 3B(9) cmt. This definition comports with other common definitions of “proceedings” as roughly equivalent to “adjudication.” See BLACK’S LAW DICTIONARY.


85 See id.

86 According to the U.S. Department of State:

The Government of Brazil asserts that, under Brazilian Constitutional Law, only Brazilian judicial authorities are competent to perform acts of a judicial nature in Brazil. Brazil has advised it would deem taking depositions in Brazil by foreign persons to be a violation of Brazil's judicial sovereignty. Such action potentially could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants.
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Under the newly broadened terminology, however, the deposition would arguably be a “matter”\textsuperscript{87} that is “pending” the German court,\textsuperscript{88} and as a result there would be two “matters” that are “pending” and the activities of the lawyer in Germany could be said to be “in connection with” with either or both of them. In other words, by using the term “matter,” to the extent that Rule 8.5 sought to clearly indicate a single set of ethical rules that apply to given conduct, it no longer does. Instead, it raises the possibility that the rules of more than one jurisdiction may be applied.\textsuperscript{89} The resulting confusion undermines the brightline guidance that Rule 8.5 was supposed to bring.

D. Conclusion

For activities before international tribunals, many of the interpretive problems of Rule 8.5(b)(1) could be avoided if those tribunals had their own ethical rules, which would then apply under Rule 8.5(b)(2). Unfortunately, while the need for such rules seems palpable, only a few international tribunals have created such rules. The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and more recently the International Criminal Court (“ICC”) have adopted codes for professional conduct for attorneys appearing before them. The WTO Appellate Body and the International Court of Justice have declined to take this step, while international arbitral tribunals and arbitral institutions (which promulgate the rules that govern arbitral proceedings) do not articulate any standards of

\textsuperscript{87} The Model Rules do not define the term “matter.” Some rules do. For example, the District of Columbia Bar’s Rule of Professional Conduct 1.0(h) defines “matter” to mean “any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.” Under this definition, the German court-supervised deposition would apparently constitute a “matter.”

\textsuperscript{88} Noting that the text of Rule 8.5 leaves uncertainty about which ethical rules apply does not suggest that there should only be rules from a single jurisdiction that governs an advocate’s conduct. See infra notes __-__, and accompanying text.

\textsuperscript{89} Since the Reporter’s Explanation indicates that the change in terminology was not intended to result in a substantive change, I set aside this ambiguity raised by the term “matter” and instead treat the current text as effectively synonymous with the earlier version of Rule 8.5. Further discussion of ethical rules in situations when multiple tribunals may all be involved in the same “matter” or proceeding is discussed infra notes __-__, and accompanying text.
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professional responsibility for counsel. To the contrary, on some occasions arbitral tribunals have affirmatively disclaimed responsibility for doing so on the grounds that professional regulation is non-arbitrable or beyond the jurisdictional power of the tribunal. The next Part explores in more detail the problems associated with applying national ethical rules in international proceedings, as well as some of the problems with the current choice of law approach to regulating attorneys involved in transnational litigation.

II. From Drafting Defects to Awkward Applications

The focus until now has been on ambiguities and conceptual problems in the text of Rule 8.5. In this Part, I take up the more substantive problems that arise when it is applied in specific contexts. As expected, the conceptual problems manifested in the text are amplified in application of Rule 8.5.

A. National Courts

When Rule 8.5 is applied to transnational litigation in national courts, either in the United States or in foreign systems, it is generally more disruptive than it is effective. There is one exception, where the Rule actually clarifies the obligations of an attorney. In the relatively peripheral example of dual-licensed attorneys whose primary legal education and licensing is in a foreign country, but who also hold an LL.M. degree from a

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90 As I have argued elsewhere, despite the formal absence of ethical regulation of attorneys in international arbitration, such regulation inevitably occurs:

Even if they remain unspoken, such perceptions of apparent misconduct (or ineptitude) inevitably affect arbitrators' decisions on the merits, computations of damage awards, and assessments of costs and fees…. These informal sanctions violate the most fundamental notions of procedural fairness by imposing punishments for violations of unknown rules and without any opportunity to be heard. Such reactions to perceived attorney misconduct might also be sanctioning an innocent party. Clients pay substantive awards, costs, and fees, but the misconduct may belong wholly to the attorney.


91 Award in ICC Case No. 8879, in Grigera Naon, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9, 158 (2001) (even if claims asserted against counsel for one party for ethical violations were within scope of arbitration clause, they would be non-arbitrable, because they concern “the criminal consequences of alleged advocate misconduct”).
U.S. law school and a secondary bar admission in New York, California or another jurisdiction that permits admission for foreign-educated applicants, Rule 8.5 brings clarity.\(^92\) It is estimated that most of these foreign-educated lawyers work either on the transactional side of multi-national law firms, or return to their own country of origin, using the U.S. bar admission as a credential (not unlike the LL.M. degree itself).\(^93\) In the latter instance, these attorneys may be appearing before the national courts of their home jurisdictions. Under Rule 8.5, these attorneys would not be responsible for abiding for the ethical rules of the U.S. jurisdiction from which they obtained their bar-admission-cum-credential. In this limited example, Rule 8.5 seems to have its truly desired effect of eliminating application of a set of ethical rules that have little or no relevance to particular legal activities. In other situations, the Rule effectively excuses global advocates from exercising professional discretion regarding what ethical rules to follow.

1. Ethical Discretion in Abiding by Foreign Ethical Rules

As noted in the introduction, one of the defining features of global advocates is that they routinely engage in regulatory arbitrage.\(^94\) This process requires them to evaluate the inter-relative effects of particular rules in determining which ones can or should apply to a particular situation. This is a unique and valuable skill. When it comes to conflicting codes of ethics, however, Rule 8.5 excuses attorneys from using this skill or from exercising any professional discretion regarding what rules apply. Global advocates uniquely qualified to exercise such discretion, and experienced ones clearly do despite Rule 8.5.

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\(^94\) See infra notes __-___, and accompanying text.
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Apart from dual-licensed attorneys with a foreign primary law degree, described above, U.S.-licensed attorneys rarely appear as advocates in foreign legal matters. The most likely situation in which they take part in a foreign proceeding is not as advocates, but as experts on foreign law. Otherwise, U.S.-licensed attorneys might participate in a foreign legal process that is ancillary to a U.S. matter, such as the example described above of a deposition being taken before a foreign judicial officer. Other examples may include a request for interim relief in a U.S. matter made to a foreign tribunal or proceedings to enforce a U.S. judgment abroad. In any of these situations, the fact that these activities are undertaken “in connection with” a U.S. legal proceeding would mean, under Rule 8.5, that U.S. ethical rules would be applied in any disciplinary action brought by a U.S. bar association. Since the conflict of laws rule in 8.5(b)(1) does not admit of any exception, it seems to instruct authorities to disregard violations of foreign ethical rules that may occur in these situations.\(^\text{95}\)

Even though Rule 8.5 would only subject U.S. attorneys to U.S. rules when activities are connected to U.S. proceedings, it would not preclude an ethical “double jeopardy” if a foreign bar association, such as the German or Brazilian bar association in the example above, decided to assert jurisdiction over a particular activity.\(^\text{96}\) In that instance, the German bar would not apply Rule 8.5 and would more likely apply German ethical rules to activities before a German judge in a German courtroom.\(^\text{97}\) Apart from this as-yet improbable disciplinary consequence from a foreign bar, U.S. attorneys have other reasons to conform to foreign ethical rules, such as avoiding possible criminal prosecution or possible risks to the success of

\(^{95}\) As described in more detail below, attorneys may still be accountable for violations of foreign law under Rule 8.4. *See infra* notes ___-___, and accompanying text.

\(^{96}\) The doctrine of double jeopardy only formally applies with respect to criminal proceedings within the United States. *See* cite. The fundamental concern underlying the doctrine—that an individual should not be subject to prosecution by multiple authorities for the same underlying conduct—has an exception when separate sovereigns are applying the sanctions. The activities of global advocates, almost by definition, are subject to review by separate sovereigns. Thus, while the doctrine does not formally apply, the same underlying concern is present.

\(^{97}\) As noted above, bar associations per se have not to date asserted such interest, though some nations have imposed sanctions through their criminal laws. *See supra* notes ___-___, and accompanying text.
the legal activity itself. This exercise of professional judgment, which experienced global advocates inevitably already undertake, is currently obscured and obviated by of Rule 8.5. While U.S. attorneys should be encouraged to consider and comply with foreign ethical rules, they are instead ethically excused from even considering other potentially relevant ethical rules.

2. Criminal Acts and Prejudice to the Administration of Justice

Even though Rule 8.5 appears to permit a U.S. attorney to violate foreign law and professional conduct rules, that conclusion does necessarily end the analysis. Model Rule 8.4(b) defines “professional misconduct” to include the commission of “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects[.]” Meanwhile, Rule 8.4(d) adds that any “conduct that is prejudicial to the administration of justice” is also professional misconduct. If we asked the drafters of Rule 8.4, whether they intended “criminal acts” and “the administration of justice” to include foreign law and systems, they would probably reject the notion. Rule 8.4, however, was drafted when Rule 8.5 was still limited to domestic practice. The extension of Rule 8.5 to transnational practice requires consideration of whether and how to apply these provisions beyond the U.S. system.

If Rule 8.4’s provisions are extended to foreign law and foreign systems, then they seem to resurrect all the conflicts that Rule 8.5 sought to put to rest. On the other hand, if these provisions of Rule 8.4 do not apply to foreign and international law, then U.S. ethical rules raise important questions about international judicial comity and attorneys’ ethical obligation to obey the law and contribute to the rule of law. These issues will be taken up in Part III, but for now, as a matter of interpretation, it is

98 For example, a German judge might not complete a judicially supervised deposition if it is learned that U.S. counsel was improperly speaking to the witness.
99 Model Rule of Professional Responsibility 8.4(b).
100 This interpretation finds an analogue in Section 307 of the Sarbanes-Oxley Act, which imposes reporting obligations on attorneys whenever they have credible evidence of a “material violation of law.” But “material violation” is defined to mean a violation of “applicable U.S. federal or state securities law, …[a] fiduciary duty arising under federal or state statutory or common law, or a similar …any U.S. or state law. A violation of foreign law is not considered a ‘material violation.’” Stanley Keller, Implementing the SEC's Standards of Professional Conduct for Attorneys, SP018 ALI-ABA 675 (2008).
interesting to note that state bar associations have applied Rule 8.4(b) to
everything from driving under the influence of alcohol, to acts of domestic
violence, to willful failure to file an income tax form, to sexually
inappropriate behavior, to drug possession. Commentators have
suggested that the gravity of the offense is less important when it is related
to the practice of law. Under this reasoning, it seems unlikely that global
advocates’ activities would be precluded from the purview of Rule 8.4
simply because they implicate foreign laws. After all, their ability to
operate outside the U.S. legal system is the primary skill that global
advocates market to their clients.

If this is not the effect of Rule 8.4, then Rule 8.5 appears to ethically
excuse violations of foreign law and foreign ethical rules when undertaken
in connection with a U.S. matter. In this respect, Rule 8.5 transforms a
violation from being an unintended mishap by an accidental legal tourist
into conduct that is considered ethically acceptable or at least irrelevant to
U.S. regulatory authorities. This outcome seems to do as much harm to the
perceived integrity of the U.S. lawyers as the underlying violations
themselves.

B. Public International Law Tribunals

Rule 8.5(b)(1) is equally pernicious when applied to conduct
connected to international tribunals. Reference to “tribunals” was
specifically intended to extend the Rule to non-judicial settings, such as
international arbitral tribunals. Obliging U.S. attorneys who appear
before international courts, international tribunals or international
arbitration tribunals to adhere to the rules of the place where such tribunals
“sit” virtually ensures that U.S. attorneys will be bound by rules that are

101 See, e.g., People v. Meier, 954 P.2d 1068 (Colo. 1998) (concluding that “‘any
practicing attorney would know’ that asking a prospective and obviously vulnerable
divorce client about the size of her breasts would ‘adversely reflect’ on the lawyer's fitness
to practice law”); Lawyer Disciplinary Actions, 36-SUM Ark. Law. 40 (2001) (attorney
disbarred for violation of 8.4(b) for conviction of two violations of Freedom of Access to
Clinic Entrances Act (“FACE Act”)); Lawyer Disciplinary Actions, 32-SUM Ark. Law. 37
(1997) (“use and possession of illegal drugs constituted “a criminal act that reflects
adversely on (a) lawyer’s ...fitness as a lawyer...” in violation of Model rule 8.4(b)”).

102 See Thomas H. Moore, Can Prosecutors Lie? 17 GEO. J. LEGAL ETHICS 961, 971-
972 (2003-2004) (suggesting that various jurisdictions have approached this matter
different ways).

103 See supra note ___, and accompanying text.
different from those applicable to opposing counsel and wholly unrelated to the proceedings themselves.

Consider, for example, what effect Rule 8.5 would have on proceedings before the International Court of Justice, which sits in The Hague. This location was chosen because The Netherlands is a neutral jurisdiction and a facility was made available to the Court by the Carnegie Foundation, which owns and administers the Peace Palace. None of the members of the Tribunal are necessarily Dutch. Neither Dutch law, nor Dutch procedure, nor the Dutch bar, nor even the Dutch language has any consistent relationship with, or even relevance to, proceedings before the Court. Under Rule 8.5, however, an American attorney appearing before the ICJ would be charged with understanding and abiding by Dutch ethical rules, which are written in Dutch (though also available in English) and designed to apply in Dutch domestic legal proceedings. Moreover, this result is only half of the problem. Non-lawyer representatives would not be required to abide by Dutch ethical rules. Even when representatives are attorneys licensed in some jurisdiction other than the United States, no other country in the world appears to have a rule similar to Rule 8.5. As a result, no other nation’s attorneys would be required to abide by Dutch ethical rules.

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104 The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. Although some Dutch judges have served, it is neither required nor common for a small country like the Netherlands to have a judge on the court. International Court of Justice, Statute, Chapter 1, Organization of the Court (Articles 2-33) [see http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_III] (Judges are elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration).

105 The official languages of the ICJ are English and French. Id. at Article 39. It is possible that, on occasion Dutch lawyers appear before the ICJ, just as Dutch judges may be appointed to it, though their appearance is a matter of coincidence rather than part of an established or systemic relationship. See, e.g., Mark S. Ellis, The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia, 37 NEW ENG. L. REV. 949, 959 (2003) (describing how Professor Michail Wladimiroff, one of the Netherlands’ most respected criminal lawyers, was assigned as lead counsel for high profile trial of ____Tadic).


107 As with many other international tribunals, the ICJ requires that attorneys be admitted to practice in any state, not necessarily in the state where it operates. [JC: cite]

This example illustrates with the ICJ what is true of application of Rule 8.5 to virtually all international tribunals—it has the pernicious effect of injecting a third, wholly unrelated set of ethical obligations into international proceedings, thus further splintering the existing ethical divide. Meanwhile, for all the reasons analyzed above, U.S. bar associations will encounter considerable difficulty in interpreting Dutch ethical rules, or applying them in proceedings before the ICJ, where they were not intended to apply.

C. International Arbitration

As noted above, Rule 8.5 means that U.S. attorneys appearing in an international arbitration are bound by the ethical rules of the jurisdiction in which the arbitral tribunal “sits.” Even if the terminological problem of “sit” and “seat” is satisfactorily addressed through interpretation, there remain questions about whether it makes sense to bind attorneys, and as described below arbitrators, by the ethical rules of the arbitral seat and whether national bar associations are the institutions best suited to regulate professional conduct in international arbitration settings. The former set of questions will be addressed in this Section, whereas the latter set of questions will be taken up in Part III.

1. Unevening the Playing Field and Pre-Empting Client Prerogatives

Some of the oddities involved in applying the ethical rules of the seat of public international tribunals also apply to the international arbitration context and, at this point, it is worth taking a closer look at some of their implications. One of the consequences of linking ethical regulation to the seat (or where a tribunal “sits”) is that it virtually guarantees that opposing counsel in the same proceeding will be abiding by different rules since other bar associations do not have similar conflict of law rules. For example, in a proceeding seated in the U.S. between an American and a Mexican party, the U.S. attorney would be subject to strict U.S. rules regarding conflicts of interest, but a Mexican attorney in the same proceedings would not be. The Mexican attorney, instead, would likely operate under a presumed obligation (or a professional instinct) to abide by Mexican conflict of interest rules.

Switching the situs reveals another problem with the Rule—that it ignores the effect of a change in ethical obligations on the party who holds the right to be free from conflicted representation. If the arbitration were
seated in Mexico, which would mean that under Rule 8.5 Mexican conflict rules would apply to the U.S. attorney. Under those rules, the American attorney is apparently permitted to engage in representation that would be considered conflicted representation under U.S. rules, and would give rise to related concerns about protections of confidential information. The injury from the conflict and potential disclosures or misuse of confidential information will likely be borne by an American party. That party likely entered the original representation with expectations that U.S. ethical rules would continue to protect its interests into the future and presumably never consented to the conflicted representation.

2. Regulating Arbitrators Below the Radar

Buried in the third note of Reporters’ Explanation of Rule 8.5 (“Note 3”) is yet another extension of the Rule that so far seems to have been overlooked by attorneys and commentators. Specifically, Note 3 of the Reporter’s Explanation provides that:

Lawyers who participate in [arbitration and other methods of formally adjudicating the rights of parties], whether as neutrals or as party representatives, should be bound by the Rules of Professional Conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they otherwise provide.109

Although this provision is not part of the actual text of the Rule, or even of the official Comments, it suggests a rather radical extension of Model Rule 8.5 to activities of attorneys when they act as arbitrators. This extension would come as a great surprise to most U.S. attorneys engaged in international arbitration as arbitrators, which has two important implications.

At a procedural level, Note 3 subjects attorney conduct as arbitrators to oversight by the bar that licensed them as attorneys, while at a substantive level it implies that the rules that will be applied to their activities as arbitrators are the same rules that apply to them when they act as attorneys.

The apparent rationale for Note 3 is that when attorneys act as arbitrators, they do not cease to be licensed by the relevant bar association

109 Reporter’s Explanation, supra note ___, at 830, n.3.
and they should therefore still be bound by its ethical obligations and subject to its disciplinary jurisdiction. There are some reasons for this linkage. Even if acting as arbitrators, attorneys are arguably providing a form of “legal services.” Moreover, the ethical obligations of arbitrators and attorneys seem to bear some at least superficial resemblance to each other. Attorneys must be free from conflicts of interest, just as arbitrators must be free from bias. Attorneys must conduct “conflict checks” before accepting representation, just as arbitrators have a “duty to investigate” before accepting an appointment.

Despite this superficial resemblance, however, the role of advocate if fundamentally different from the role of arbitrator, even if the two roles can be performed by the same person. As Carrie Menkel-Meadow points out, “[o]ur conventional rules of ethics are particularly inapposite when lawyers serve in quasi-judicial roles as arbitrators . . . .” \(^{110}\) Attorney ethics were developed to guide and regulate conduct of individuals acting as advocates on behalf of clients. Applying them directly to other activities can only lead to confusion. \(^{111}\) Attorney ethical rules do not apply when attorneys engage in activities such as Little League umpires, law school lecturers, governmental officials and, perhaps most tellingly, judges. Instead, there are specialized rules to regulate their activities in those roles, just as special rules have been developed to guide and regulate arbitrators. \(^{112}\)

Even if it is agreed that the content of attorney ethical rules should not be superimposed over arbitrators’ activities, there is still a separate question of whether bar associations may nevertheless be an appropriate regulatory body to enforce the rules that are applicable. Perhaps the most

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\(^{111}\) Nevertheless, some courts and commentators have unwisely attempted just that. See Schmitz v. Zilveti, 20 F.3d 1043, 1048 (9th Cir.1994) (tying arbitrator’s obligation to investigate possible conflicts of interest to his status and ethical obligations as a lawyer); Geoffrey C. Hazard, Jr., *When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues*, in 12 ALTERNATIVES TO THE HIGH COST OF LITIGATION 147, 147 (1994) (“Applying this rule [regarding conflicts of interest] to [mediation], a law firm engaging in ADR practice must observe the rules of ethics--particularly the rules concerning conflict of interest--in the ADR work and the other practice, considering them as a single practice.”).

\(^{112}\) See Catherine A. Rogers, *The Ethics of International Arbitrators* in *LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* (2008).
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A forceful argument in favor of having bar associations perform this function is that currently there is no regulatory body that purports to be able to regulate, or provide ethical oversight for, arbitrators. As one scholar has wryly noted, “barbers and taxidermists are subject to far greater regulation than [arbitrators].”113 When arbitral institutions and courts preside over challenges to arbitrators or (in the latter case) allegedly bias-tainted awards, they assess the effects of alleged misconduct and provide a remedy to potentially aggrieved parties.114 They do not, however, directly regulate arbitrators. The fact that arbitrators also generally enjoy immunity from civil liability for misconduct means that arbitrators are insulated from virtually all mechanisms that regulate lawyers, other than reputational sanctions and related market consequences.

Some might argue that this regulatory vacuum should be filled by national bar associations, even if they are not applying the same rules that apply to attorneys. This rationale is clearly what lead to the development of the proposed Model Rule of Professional Conduct of the Lawyer as Third Party Neutral,115 which would provide that special set of rules. While this effort should clearly be applauded as a useful development in regulating domestic arbitrators, its utility in regulating international arbitrators remains dubious. This point is illustrated by the fact that other domestic efforts at regulating arbitrators usually exempt international arbitrators.

Unlike domestic arbitration, there are numerous, multi-cultural and overlapping sources that may affect the nature of arbitral proceedings and hence the function and professional obligations of international arbitrators. If national bar associations become the primary interpreters and enforcers of these various sources, just as with attorneys,116 the risk is that instead of coherence and consensus, enforcement efforts will lead to greater fragmentation and incoherence.

III. Global Advocates and Their Ethical Obligations


114 Review of arbitral awards is not only an indirect assessment of alleged arbitrator misconduct, but also a particularly anemic one.

115 The proposed Model Rule is a product of a joint undertaking by the Center for Public Resources and the Georgetown University Law Center, which was drafted for adoption into the Model Rules for Professional Conduct. Available at www.cpradr.org (under “Public Policy Projects”) (last visited February 22, 2008).

116 See supra notes ___-___, and accompanying text.
The first Parts of this Article have examined challenges inherent in regulating global advocates and the limitations of Rule 8.5 and other current attempts. This final Part considers broader and more prescriptive questions of how global advocates should be regulated. To that end, this Part challenges the basic approach and underlying assumptions of Rule 8.5. In Section A, I argue against an omnibus choice of law rule, such as Rule 8.5, in favor of more conventional rules, which prescribe different choice of law solutions for different types of attorney conduct. Recognizing that limitations will exist even with more refined choice of law provisions, Section B emphasizes the need to leave room for a measure of attorney discretion in cases where violations of foreign law or ethical rules may be justified. I explain in Section C why conflict of laws stop-gaps like Rule 8.5 cannot provide a final alternative because they leave open important questions about how to define attorneys’ ethical role and obligations when they are detached from any particular legal system. Section D argues against application of national rules in proceedings before international tribunals and urges that they adopt their own ethical rules. Finally, in Section E, with respect to enforcement, I argue that home licensing authorities are not institutionally adept to enforce unfamiliar ethical rules applied to activities that occur in far off and distant proceedings. I propose instead that they work in cooperation with foreign bar associations and international tribunals to effectuate discipline identified by those bodies under applicable rules.

A. Moving Beyond One-Size-Fits-All Analysis

According to conventional analysis, conflict-of-laws analysis should seeks to identify a single legal rule that applies to specific conduct based on an evaluation of the contacts of the actors involved and competing interests of the relevant sovereigns whose territory is implicated in those contacts.\(^\text{117}\) To that end, conflict-of-laws analysis usually begins by classifying a specific factual situation under “the appropriate legal categories and specific rules of law.”\(^\text{118}\) Rule 8.5 defies this analysis. Instead, the Rule replaces a specific factual situation or event with the broad category of “advocacy before a tribunal.” Instead of then parsing out individual rules, it prescribes

\(^{117}\) See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.1 (4th ed. 2004); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS, pg. 1 (3d ed. 2002). There are of course other schools that diverge from this more conventional approach, arguing that choice of law should not be jurisdiction selecting.

\(^{118}\) Restatement (Second), Conflict of Laws § 7 (Comment B).
substitution of an entire, monolithic code of legal ethics depending on and derived from the physical location where that tribunal is located. Apart from being anomalous to traditional conflict of laws analysis, this approach leads to disturbing results, since not all ethical rules that would be substituted out are limited in their effect to the immediate proceedings. For example, Dutch ethical rules, applicable in a proceeding before the Iran Claims Tribunal, would permit a U.S. attorney to engage in what would be considered conflicted representation before the Iran Claims Tribunal, even though the brunt the conflict would be borne by another client who is not party to the current proceedings. Conversely, as noted above, it implicitly authorizes continued violations of foreign laws whenever they are connected to a U.S. matter. Under Rule 8.5, Bhopal style advertising and pre-testimonial communication with German deposition witnesses would still be permitted despite being illegal and unethical in the host countries.\(^{119}\)

In related areas, other conflict of laws regimes have taken a more careful and constructive approach.\(^{120}\) In the context of judicial procedures, for example, analysis separates out individual procedural events and specific activities, each of which receives its own particularized analysis regarding which legal rules should be applied. Under this approach, the provision of notice, the exchange of pleadings, the trial itself and, within trial proceedings, even burden of proof and questions of witness competence and credibility, each receive their own separate analysis regarding which system’s rules apply.\(^{121}\) This individualized analysis is necessary because for each procedural stage, the factors relevant to selection of an applicable rule may have different weight, depending on the purpose of a particular rule and the interests affected by the activity.\(^{122}\)

\(^{119}\) See supra notes __-___, and accompanying text.
\(^{120}\) Cites to Restatement on Conflicts for Contracts, Torts; Rome Convention; Dicey & Morris.
\(^{121}\) See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 123-139.
\(^{122}\) Section 6 of The Restatement (Second) Conflict of Laws provides a good summary the factors that are generally considered in determining which rules should be considered to determine the applicable rule of law:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
Similarly, in the area of legal ethics, the UK corollary to Rule 8.5 is the Solicitors Regulation Authority’s (“SRA’s”) Rule 15 regarding “Overseas practice.” In place of Rule 8.5’s terse directive, SRA Rule 15 has an extensive preface that explains exactly how it applies. It then slogs through the each of rules in the Solicitor’s Code of Conduct, providing individualized guidance about the application of each to activity abroad. Notably, UK confidentiality and conflict of interest obligations continue to apply to activities abroad, but the UK prohibition against contingency fees does not apply to representation in foreign jurisdictions. As a result, SRA Rule 15 ends up with much more salient results than Rule 8.5, particularly regarding rules that protect clients and third parties who are not directly involved in the relevant “matter.”

B. Regulatory Arbitrage and Professional Discretion

Another unpleasant side-effect of Rule 8.5’s omnibus approach to conflict of laws is that it completely obviates the need for attorneys to exercise any professional judgment in selecting applicable rules. Rule 8.5 implicitly authorizes attorneys to violate—with ethical impunity—foreign law and ethical prescriptions. They are granted this free pass to lawlessness without any obligation that they spend even a moment of professional reflection to assess the value of the activity to the case or the relative importance of the foreign law or rule being violated. To be sure, attorneys may sometimes be justified in violating foreign law, particularly if the foreign law would significantly impede or prevent a just result in a legal proceeding that is not exclusively subject to that nation’s laws. The fact that a violation can sometimes be justified, however, requires the some exercise of discretion to determine if it is present in an individual case.

(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

123 See Solicitors Regulation Authority (“SRA”) Code of Conduct, Rule 15.
124 As noted above, this is because in any U.S. matter, U.S. ethical rules would apply. See supra notes ___ and accompanying text. This interpretation assumes that other ethical rules, such as Rule 8.4, do not separately impose an obligation to abide by foreign law or ethical rules.
125 Cf. Telenor Mobile Communications AS v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (reasoning that it was far from clear that New York had a public policy against compelling individuals to violate foreign law, in this case a foreign injunction against enforcing an arbitration award).
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Notably, both SRA Rule 15 and Rule 2.4 of the CCBE use language that suggests that attorneys can and should engage in some evaluative process.  

Another failing of the omnibus approach of Rule 8.5 is that it in the cases like the Bhopal disaster, Indian law and ethical rules prohibiting advertising or solicitation for a case could be, and arguably should be, despite location of the adjudication in New York. Similarly, German ethical rules prohibiting pre-testimonial communication could apply to a deposition being taken in Berlin for use in a case pending in California. In apparent disregard of Indian and German interests, Rule 8.5 would make the same body of ethical rules apply to all these areas.  

Such an indiscriminate approach is not necessary.

SRA Rule 15, by contrast to Rule 8.5, includes a provision to allow solicitors to comply with local law. Specifically, it provides “if compliance with any provision of these rules would result in your breaching local law, you may disregard that provision to the extent necessary to comply with that local law.” This rule does more than simply reject Rule 8.5’s tacit approval of violations of foreign law. By using the word “may,” SRA Rule 15 appears to permit attorney discretion in resolving conflicts between the SRA Code of Conduct and foreign local law. In a similar vein, though different framework, Federal Rule of Civil Procedure 4 permits, under

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126 Specifically, Rule 2.4 of the CCBE, which is entitled Respect for the Rules of Other Bar Associations and Societies, provides:

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity. Member organisations of the CCBE are obliged to deposit their codes of conduct at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

127 Notably, India, Germany and other countries are still able to prohibit these activities and prosecute attorneys who are caught violating these prohibitions. Within national systems, however, violations of law and rules, particularly those related to law practice and the integrity of the justice system, are usually also regarded as an ethical violation as provided in Rule 8.4.

certain circumstances, service of process in violation of foreign law, but only after a judge has evaluated whether such action is justified.\footnote{Those circumstances, most notably, include an order from a Federal District Court judge directing such service. See \textit{Fed. R. Civ. P. 4(f)(3)}.}

In determining whether violation of a foreign rule is justified, one consideration might be whether the two rules are simply inconsistent or whether they conflict directly. Conflicting rules raise problems that are distinct from those raised by rules that are merely inconsistent. Conflicting rules are those situations in which the rule from one system requires what the other system prohibits. The problem here is that an attorney is compelled by one system to do something that another system prohibits. The conflict, in other words, creates an unavoidable risk of professional discipline, though not necessarily in the attorney’s home jurisdiction. By way of concrete example, consider a letter by a French attorney to a U.S. attorney that is marked confidential, but which explains what conditions her client would agree to settle. Under French ethical rules, a receiving attorney of such a communication would be prohibited from sharing the letter with its client, but under the U.S. ethical rules, a receiving attorney would be required to communicate the letter, which contains a settlement offer, to her client. It is impossible for the attorney to comply with both rules because they directly conflict. In that instance, allowing or even requiring the attorney to violate the foreign ethical rule can arguably be justified.

With rules that are merely inconsistent, where is no direct conflict, permitting violations of foreign rules or law may well be less justifiable. With inconsistent rules, one system permits what the other system prohibits. In that situation, the attorney is not facing a Catch-22, but rather a potentially strategic opportunity for regulatory arbitrage. Given a choice, the attorney would typically prefer the rule that permits, or even requires, conduct that is most advantageous for the client. For example, in a deposition in Germany for a U.S. litigation, the U.S. attorney would likely prefer to abide by U.S. rules that permit pre-testimonial communications, particularly if the other side’s counsel were bound by the German prohibitions against such prohibitions and assuming the judge would not find out. In its current form, Rule 8.5 appears to relieve the attorney of any concern that such pre-testimonial communication may violate German law and represent an affront to a German sense of procedural fairness. With
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inconsistent rules, an attorney could comply with both rules at the same time. In that circumstance, it is not clear why violation of a foreign rule should be countenanced. To the extent a violation of foreign ethical rules or law can be justified, the process of justification requires the exercise of discretion to evaluate the need for a particular procedure against other factors, such as the interests of the State whose laws or rules will be violated.

C. Ethics in International Proceedings

International tribunals change the roles of the advocates who appear before them, often making the national ethical rules of attorneys who appear before them obsolete, if not inapposite. The pull of national ethical obligations remains strong, however, because the attorneys arrive with pre-conceived notions of their role that were shaped though an amalgam of elements from their national systems. Meanwhile, many of the formants that shape attorneys’ national conceptions of their role simply do not exist, or do not exist to the same extent, in international contexts. International tribunals are detached from the national legal systems, and hence are without their own cultural traditions and established malpractice standards. They have procedures and customary practices that are much newer (and in most cases less developed) than national courts. For these reasons, some commentators have argued that they do not need (or cannot have) their own ethical rules, but should instead rely on choice of law principles to determine which national ethical rules should apply.

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130 See, e.g., Rogers, supra note ___ at 407 (arguing that “the interrelational functional roles of actors in the international arbitration system” are “assigned by the procedural arrangements of international arbitration” and “reflect the underlying cultural values of the international arbitration system”).

131 Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception Of Lawyers’ Responsibilities, 38 S. Tex. L. Rev. 407 (1997); see also supra notes ___-___, and accompanying text.


133 This observation is most true with respect to certain so-called public international law tribunals, but less true with respect to international arbitration, which is often touted as contributing to the development of international procedures. See Crook

134 Kirsten Weisenberger, Peace Is Not The Absence Of Conflict: A Response To Professor Rogers’s Article “Fit And Function In Legal Ethics,” 25 Wis. Int’l L.J. 89
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A conflict of laws approach has the appeal of tapping into well-established and institutionally grounded rules, national legal ethics cannot provide meaningful guidance when the essential role of an advocate has changed. An advocate’s ethical obligations are intimately linked to the role they perform in a particular procedural regime. Instead, what is needed for attorneys to fully appreciate and function in their new role is retraining or re-acculturation into the relevant international system.

Some international tribunals have developed their own ethical rules, through a combination of pragmatism and re-acculturation. Practice before international tribunals is a distinctive “blend of international and domestic concepts and procedures, [that requires] unique skills, experience, knowledge, strategic sense and training[.]”\(^{135}\) Since national legal training does not generally prepare attorneys for practice before international tribunals,\(^ {136}\) professional competence often requires re-acculturation and re-training that reshape an attorney’s perception of their role as a domestic attorney into their distinct role as a global advocate.

One of the most prominent examples of re-acculturation and its relation to ethical norms is the ICTY. The ICTY is made of twenty-five judges from twenty-three different countries and “[t]he defense bar of the ICTY has 257 members, drawn from multiple legal traditions, with roughly

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\(^{136}\) This is less true today with the proliferation of international moot court competitions to accompany the proliferation of international tribunals themselves. While the Jessup Moot is the oldest moot, the new investment arbitration, and the International Criminal Court moot also offer students opportunities not only to address international arguments under international procedures, but most often to argue against law students from other countries. For example, the Vis International Arbitration Moot draws over 200 teams from around the world to Vienna, and X teams to Hong Kong for the Vis East. Fifteenth Annual Willem C. Vis International Commercial Arbitration Moot http://www.cisg.law.pace.edu/cisg/moot/participants15.html (2007-2008).

half of the defense bar from the former Yugoslavia[.]."

As part of their participation in ICTY proceedings, attorneys are explicitly re-trained and culturally re-orientated in order to develop professional and social norms that are essential to performing the role assigned to them by the ICTY. As a shorthand, this retraining can be summarized as taking “[c]ivil and common law lawyers” and reorienting them to the “new hybrid trial model [of the ICTY] and their role within that model.” All attorneys at the ICTY undergo this re-orientation. It has been particularly important, however, with respect to Soviet-era trained lawyers, who viewed the role of the criminal defense lawyer as an enemy of the state.

Once the new role of attorneys before the ICTY was established, new ethical norms appropriate to the new role were developed and eventually codified. All this occurred despite the fact that “[t]here was no shared history, background, or culture to help determine the best course of action.” A similar process of professional socialization and re-orientation has occurred in international arbitration. For example, when U.S. attorneys first began appearing in international arbitration, they often engaged in systematic ex parte communications with their party-appointed arbitrators. This practice was considered acceptable in domestic U.S. arbitration and in some other countries, but rather abhorrent in

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139 Mark S. Ellis, The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia, 37 NEW ENG. L. REV. 949, 957 (2003) (“Many of the ‘qualified’ non-western attorneys were trained in the communist/socialist era, in a system that is antithetical to the Tribunal’s substantive and procedural laws.”).

140 See id.

141 See id.

142 See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993) (finding no misconduct despite finding that party-appointee met with representatives and witnesses of appointing party before arbitration to plan strategy); Lifecare International, Inc. v. CD Medical, Inc., 68 F.3d 429 (11th Cir. 1995); Drexel Burnham Lambert Inc. v. Pyles, 701 F. Supp. 217 (N.D. Ga. 1988). These cases involved domestic U.S. arbitrations, which means that these objections did not arise because of conflicting cultural perspectives on ex parte communication. It should be noted that even in the United States, these practices have met with significant criticism; 56 Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution, 56 U. Miami L. Rev. 949 (2002); James H. Carter, Improving Life with the Party-Appointed Arbitrator:
international arbitration practice, which deems permissible only limited communication on procedural matters. Through a process of social re-orientation within the arbitration community, an ethical norm against most forms of *ex parte* communication has emerged, is followed in most cases and is now incorporated into various arbitral rules and codes of ethics.

In another example, as with the ICTY, in international arbitration there was a notable gap in perceptions and practices about extensive pre-testimonial preparation of witnesses. Skepticism about pre-testimonial communication is most pronounced among lawyers from civil law traditions. For example, German attorneys are generally prohibited from engaging in pre-testimonial communications with witnesses in German judicial proceedings. German attorneys in international arbitration practice, however, have professionally reoriented and developed a new norm of

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Cleare Conduct Guidelines for “Non-Neutrals,” 11 AM. REV. INT’L ARB. 295, ___ (2000); see also Andreas Lowenfeld, *The Party Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59 (1995) (noting that such partisanship among arbitrators is not the norm in international arbitration). Recently, in response to this problem, some institutions have clarified in their arbitral rules that all arbitrators are expected to act in as “neutrals.” See, e.g., LONDON COURT OF INTERNATIONAL ARBITRATION ARBITRAL RULES, Article 5.2 (“All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party.”).


ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 225-26 (1991) (noting that “it is not unusual for there to be discussions with just one of the parties in respect of procedural matters such as availability for future hearings”); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canons III(B)(1)(permitting *ex parte* communications with any member of the arbitral tribunal “concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings”) and VII (permitting *ex parte* communications by party-appointed arbitrators as long as general disclosure is made).

professional conduct that treats such communications as ethically permissible in the international arbitration context.  

These developments signal that professional norms for international tribunals are not only possible, but critically important, to the fair and efficient functioning of proceedings. In the absence of formally developed and codified codes, such norms are emerging on an informal and ad hoc basis. While this appears to be a positive development, it is not without problems. Attorneys’ home ethical rules continues to cast a “shadow” that “is omnipresent for the lawyers and judges[,]” in part because the prevalence of international rules over national rules is not well understood.

While these ethical “improvisations” may provide an essential stopgap before formal international ethical rules are codified, they also have some serious drawbacks. Most importantly, they can mask continued or new divisions, and they can evade established enforcement mechanisms. For example, the new, unwritten ethical norm permitting German attorneys to engage in pre-testimonial communication in international arbitration does not prescribe any limitations on this new enterprise and which is not systematically or formally acknowledged by the German bar authorities.

Without any express new rule to substitute for the on that has been displaced, the German attorney arguably has more latitude than the American attorney in pre-testimonial communications. An American attorney would still be bound by U.S. ethical rules that establish the limits of limits to proper witness preparation, even if those limits can be “permeated by ethical uncertainty.” Those limitations, however, may not be obvious. A German lawyer, originally shocked by pre-testimonial communications, might reasonably infer that U.S. attorneys operate with no

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146 See Lucy Reed & Jonathan Sutcliffe, *The “Americanization” of International Arbitration?*, 4 MEALEY’S INT’L ARB. REP. 37 (2001) (suggesting that while some consensus has emerged about the possibility of preliminary communication with witnesses, there remains conflict as to the extent it is permitted); Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in CONFICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 161 (Stefan N. Frommel & Barry A.K. Rider, eds., 1999) (suggesting that arbitrators must distinguish the cultural background of parties in order to effectively preside over proceedings to which parties come with differing approaches to pre-testimonial communication with witnesses).

147 See id. at 142.


limits whatsoever in pre-testimonial communications.

This assumption would find considerable reinforcement in popular portrayals of U.S. attorneys. For example, in the 1958 film *Anatomy of a Murder*, a congenial but cynical defense attorney played by Jimmy Stewart describes to his client the legal defense to murder in such a way that his client is inspired to “recall” the facts consistent with that defense. 150 While it makes for good cinema, talking to “a witness about the law or about desired testimony before seeking the witness’ own version of events comes dangerously near [criminal] subornation of perjury[,]”151 and is generally considered a transgression of U.S. ethical rules.152 The German attorney, however, has no reason to know about these limitations and no obligation to abide by them. As a result, even with this ethical innovation designed to level the playing field, attorneys in the same proceedings may still operating under different rules. Making matters worse, these clashes may be even more concealed and more difficult to discover than when the differences were between formal, express and written rules. Finally, these new, unwritten rules are, by design, outside of formal national enforcement regimes. This escape hatch raises separate and important questions about who should enforce applicable ethical rules, which is the topic of the next section.

Rule 8.5, and arguably also Article 2.4 of the CCBE Code, acknowledge the importance of international tribunals having their own ethical rules that trump otherwise applicable national ethical rules. These concessions, however, have had limited value because to date few international tribunals have actually enacted codes of ethics for the lawyers who practice before them. In the meantime, the tug of national ethical rules has collided with the very practical need for international ethical rules.

D. Who Should Regulate Global Advocates? 153

The assumption underlying Rule 8.5 is that, wherever in the world a global advocate operates and whatever rules apply, the bar association that originally licensed the attorney should be the primary, if not sole, authority

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151 CHARLES WOLFRAM, MODERN LEGAL ETHICS § 12.4.3 (1986).
153 This title is borrowed from David Wilkins’ seminal work, entitled “Who Should Regulate Lawyers?” See Wilkins, supra note __.
that regulates them. This conclusion is based on two assumptions. The first assumption is that the bar association that has licensed the attorney has the greatest stake in ensuring the attorney’s professional conduct. The licensing association clearly has a direct interest in enforcing the rules it has promulgated and upholding the integrity of those professionals it has licensed. The force of these interests, however, may be diminished when the misconduct occurred overseas and in violation of a foreign rules and law. A second assumption is that only the licensing bar has the power to impose professional sanctions, including disbarment. Particularly in light of some of the problems described above, however, there are reasons to question whether national bar associations are particularly competent to perform this task.

Apart from the conceptual difficulties in interpreting and applying foreign ethical rules there are also practical and procedural problems. How can a local bar associations conduct disciplinary proceedings and assess factually whether misconduct is present when the relevant events occurred physically, culturally and politically far away. While licensing authorities should not be excluded from regulating global advocates, this Section argues that they should not be the front line regulators. Instead, they should assess and enforce penalties for ethical transgressions that are identified and evaluated with foreign and international tribunal and bar associations.

National bar associations exist and operate in domestic political and legal contexts. This national orientation inevitably affects their ability to apply foreign or international ethical rules, whose content may be both difficult to discern and contrary to bar associations’ own institutional sense of proper attorney conduct. For example, would U.S. disciplinary authorities be inclined to punish a U.S. attorney for “improperly” preparing a witness that would otherwise be ethically permissible or required under U.S. rules? Would U.S. authorities condemn a U.S. attorney for disclosing to a client information that was unequivocally valuable to a client, but which a foreign system required be maintained as “confidential”? Alternatively, is it possible to imagine a French bar association disciplining a French attorney

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154 See supra notes __-___, and accompanying text.
155 See supra notes __-___, and accompanying text.
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for unethical withholding of discoverable documents when no such offense exists?\textsuperscript{156}

Regulatory authorities are not all-purpose machines into which you feed into one end a set of ethical rules and receive out the other end a disinterested disciplinary decision applying those rules. Like lawyers they administer, the individuals who staff bar associations are products of a local legal culture.\textsuperscript{157} Their legal history, background and training necessarily color their perceptions about the propriety of attorney conduct and their interpretation of rules applied to such conduct.\textsuperscript{158} When filtered through national bar associations, international and foreign legal ethical rules will be refracted through these national perspectives. The ambiguities inherent in legal translation described above\textsuperscript{159} will increase the potential for distortion. A similar phenomenon has already been observed as substantive international and foreign law have been distorted when interpreted by national courts.\textsuperscript{160}

An equally important, and ultimately related, issue is that any adjudicatory tribunal must have the ability to sanction and control the behavior of attorneys appearing before them. The ability to apply rules implies the ability to develop and refine their content. International tribunals and their rules of conduct cannot, as one commentator has suggested, be held “captive to out-of-state disciplinary authorities.”\textsuperscript{161}

\textsuperscript{156} This scenario seems particularly improbable when it is taken into account how discovery itself is viewed with a healthy degree of skepticism if not outright contempt in France.

\textsuperscript{157} There are international sections to state bar associations, but they play no role in discipline. Their functions are limited to organizing research, networking opportunities and symposia on issues of international law and practice. Solicitors Regulation Authority, Rule 15, Overseas Practice (2007).

\textsuperscript{158} Cf. Wilkins, supra note ___, at 810-11 (noting that, since enforcement officials invariably exercise a certain amount of discretionary authority over the content of professional norms when they apply ethical rules in particular cases, “confering enforcement authority is tantamount to empowering a particular set of actors to place their own interpretation on these ambiguous professional norms”).

\textsuperscript{159} See supra notes __-___, and accompanying text.


\textsuperscript{161} Daly, Resolving Ethical Conflicts in Multijurisdictional Practice – Is Model Rule 8.5 the Answer, an Answer, or No Answer at All, supra note __, at 778 Daly was referring to
ITCY, which is the international tribunal that has most directly engaged issues of ethical conduct and regulation, has an established record of assessing alleged misconduct by attorneys and issuing sanctions for contempt of court. Some tribunals seem reticent to exercise any disciplinary role, while other tribunals, particularly international arbitration tribunals, seem to doubt their own power to do so (or face legal impediments to doing so). The power to resolve important international and transnational legal issues must be understood as being accompanied by a power to control and regulate the attorneys who participate in those proceedings.¹⁶²

**E. Global Advocates’ Obligations to Obey “Law”**

Any exercise of ethical discretion necessarily implicates the essential relationship between ethics and the law. Under the so-called “Dominant View,” lawyers are only required to zealously advocate for their clients and as long as they stay within the limits of the law, including the “law of lawyers,” as ethical rules are sometimes referred to, they are behaving ethically.¹⁶³ Notably, the primary justification for this “amoral,” role-differentiated approach is that the U.S. justice system relies on advocates playing these morally neutral roles.¹⁶⁴ If the justification is tied to the U.S.-style adversarial proceeding, the question become whether this “amoral approach” is ever justified outside of the U.S. system in a proceeding that is structured around an aggressively adversarial model?¹⁶⁵

¹⁶² This power may not be as acceptable in some other systems that do not give judicial officers a role in domestic contexts. For example, in France, all ethical matters are referred to In France, professional regulations are enforced locally by the conseil de l’ordre, which is the only organ that has the power to sanction members for violations of rules of conduct. See CHRISTINA DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 119-120 (Sweet & Maxwell 2d ed. 1996).


¹⁶⁴ See Wasserstrom, supra at 12.

¹⁶⁵ For an analysis of how the ethical rules of different legal systems derive from the functional role that lawyers are assigned by a particular procedural regime, see Catherine A. Rogers, Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration, 23 MICH. INT’L L.J. 341, 376-77 (2002).
In a distinct but related vein, dissatisfaction with the Dominant View has inspired extensive debate about whether attorneys’ ethical obligations extend beyond complying mere compliance with the law.\textsuperscript{166} Even in this debate, however, lawyers’ basic obligation to comply with law has only rarely itself been challenged.\textsuperscript{167} Instead, the focus has been on more nuanced questions about the definition of “law”\textsuperscript{168} and potential exceptions when moral and ethical objections counsel against obeying the law.\textsuperscript{169}

Against this foundation predicated on respect for law, the global advocate poses a new dilemma for legal ethics. Contentions that attorneys have an obligation to obey the law implicitly presume that there is one controlling body of law. What does the prospect of multiple national laws applying, or no national laws clearly applying, do to this obligation? Meanwhile, arguments that lawyers have a \textit{prima facie} obligation to obey law rest on arguments that “[i]n a society such as the United States that is tolerably just and democratically accountable, it is reasonable to conclude that, in the absence of evidence to the contrary, obeying the laws is presumptively necessary to maintain these tolerably just institutions.”\textsuperscript{170} In countries in which the rule of law, democratic institutions and basic human rights are not integrated into legal institutions, should attorneys be similarly

\textsuperscript{166} Fred Zacharias has also staked out a middle position. Fred C. Zacharias, \textit{Fitting Lying to the Court Into the Central Moral Tradition of Lawyering}, \underline{___} CASE W. RES. U. L. REV. \underline{___} (2008).

\textsuperscript{167} David Luban’s work provides an important exception. In Luban’s description of the “natural law of lawyering,” legal ethics are not tied to codified legal norms. David Luban, \textit{Legal Ideals and Moral Obligations: A Comment on Simon}, 38 WM. & MARY L. REV. 255, 255 (1996). Other scholars have pointed to important examples of when attorneys are ethically authorized to disobey the law as an indication that the boundary is not as impermeable as sometimes imagined. \textit{See Wilkins, supra} note \underline{___}, at \underline{___} (pointing to bar associations’ urging that lawyers disobey court orders to disclose confidential information as an example of an exception). The most important exceptions involve questions of what a lawyers’ obligations are when the law is immoral or unjust.


\textsuperscript{170} Wilkins, \textit{supra} note \underline{___}, at n.87.
required to abide by the law? Is the answer the same for foreign-licensed attorneys who are operating outside of the formal legal structures of the host country? Even in undemocratic dictatorships, law still holds the promise of a legitimate and authoritative framework for coordinating social cooperation. Is this sufficient to justify at least a *prima facie* obligation to obey it? Should the *prima facie* burden can be more easily overcome in such systems?

As these and other questions demonstrate, traditional definitions of legal ethics rely on established, even if debated, conceptions of “society,” of “law,” and of lawyers’ role in relationship to them both. The hallmark of the global advocate is an intentional detachment of their professional activity from any particular place or polity, and a related disconnect from any particular national law. These observations indicate that even a revamped Rule 8.5 can only be an interim measure. Developing meaningful ethical regulation of global advocates will require answering fundamental questions about the role of lawyers, particularly advocates, an international judicial system.

**Conclusion**

Many of the world’s most urgent issues of transnational regulation are increasingly being funneled into international and transnational adjudications. These adjudications are brought and managed by advocates whose ties and commitments to any particular legal system are often partial and tangential. The response to resulting ambiguities about what ethical rules apply to their conduct has primarily been a reliance on choice of law rules that designation particular national ethical rules. There is an emerging realization, however, of the inadequacy of national ethical rules, which were designed to apply to domestic practices in domestic procedural contexts in regulating global advocacy. Moreover, bar associations are limited in their ability through conventional modes of regulation to apply foreign ethical rules or effectively evaluate conduct before foreign tribunals. The current version of Rule 8.5 was an important mechanism for bringing these issues to light. Now, more systematic analysis is needed to provide more

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171 See supra notes ___-___, and accompanying text (describing the global advocate as regularly engaged in regulatory arbitrage).

meaningful rules that can be implemented not in isolation, but through
developed international networks and perhaps even eventually an
international regulatory body.